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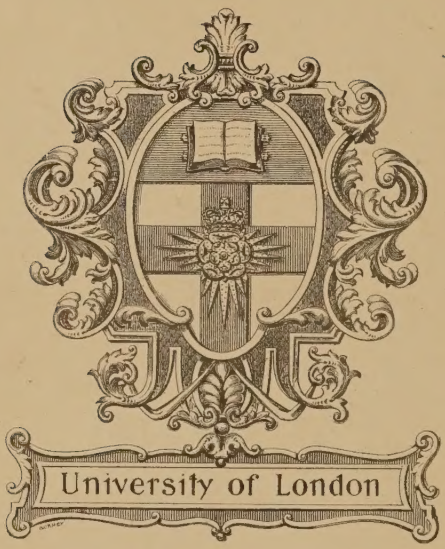

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December, 1870.

THE

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Court of Queen's Bench.

REPORTED BY

WILLIAM MILLS AND HENRY HOLROYD,
BARRISTERS-AT-LAW.

AND

In the Bail Court,

BY

E. A. C. SCHALCH,
BARRISTER-AT-LAW.

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JAMES REDFOORD BULWER, Q.C.

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TABLE OF CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Abingdon Union, Reg. *v.*	406
Allen *v.* Graves	478
—— *v.* Thompson	336
—— *v.* Worthy	163
Alsop, Thomas *v.*	151
Armstrong, North of England Insurance Association *v.*	244
Askew, Irving *v.*	208
Astley, Kent *v.*	19

B.

Baily, Dignam *v.*	53
Banks *v.* Goodfellow	549
Barber *v.* Fleming	59
Becher *v.* The Great Eastern Railway Company	241
Berry *v.* Henderson	296
——-, Longbottom *v.*	123
Bischoffsheim, Callisher *v.*	449
Bolton, Mayor of, Reg. *v.*	251
Brighton, Cuckfield, &c., Turnpike Road, Trustees of, *v.* Surveyors of the Parish of Preston	146
Browning, Hill *v.*	453
Bruton Turnpike Trustees *v.* Wincanton	437
Buchanan, Woodward *v.*	285
Buckley, Frend *v.* (Ex. Ch.)	213
——-, Preston *v.*	391

C.

Callisher *v.* Bischoffsheim	449
Cameron, Turner *v.*	306
Cardwell, Cocker *v.*	15
Cass, Spurr *v.*	656
Cliff *v.* Midland Railway Company	258
Cocker *v.* Cardwell	15
Cockrell, Francis *v.*	184,
(Ex. Ch.)	501
Cooper, Reg. *v.*	457
Cory, Hewitt *v.*	418
Cotesworth, Ford *v.* (Ex. Ch.)	544
Cramer & Co. *v.* Mott	357

D.

Davies *v.* Snead	608
Dawkins *v.* Lord Paulet	94
Dean and Chapter of Hereford, Reg. *v.*	196
Denton *v.* Peters	475
Dignam *v.* Baily	53
Dobb, West *v.* (Ex. Ch.)	460
Doulton *v.* Metropolitan Board of Works	333

PAGE

Drake's Case 33
Du Bois, Richardson *v.* 51

E.

English and Scottish Marine Insurance Company, Stringer *v.* (Ex. Ch.) 599

F.

Feldman, Marks *v.* (Ex. Ch.) 275
Fitzgerald's Case 1
Fleming, Barber *v.* 59
Ford *v.* Cotesworth (Ex. Ch.) 544
Foster *v.* Tucker 224
Francis *v.* Cockrell 184, (Ex. Ch.) 501
Frend *v.* Buckley (Ex. Ch.) 213
Fulham, West London Railway Company *v.* 361

G.

Garland, Reg. *v.* 269
Gibson *v.* Mayor, &c., of Preston 218
Godsell, Harper *v.* 422
Good, Tubb *v.* 443
Goodfellow, Banks *v.* 549
Graves, Allen *v.* 478
Great Eastern Railway Company, Becher *v.* 241
Greenwich *v.* Maudslay 397
Grice *v.* Kenrick 340

H.

Harland *v.* The Mayor, &c., of Newcastle 47
Harper *v.* Godsell 422
Harrower *v.* Hutchinson (Ex. Ch.) 584
Henderson, Berry *v.* 296
————, Notara *v.* 346
Hereford, Dean, &c., of, Reg. *v.* 196

PAGE

Herne Bay Commissioners, Webb *v.* 642
Hewitt *v.* Cory 418
Hill *v.* Browning 453
——, Jones P. O. *v.* 230
——, United Ports Insurance Company *v.* 395
Huddart *v.* Rigby (Ex. Ch.) 139
Hulme, Reg. *v.* 377
Hutchinson, Harrower *v.* (Ex. Ch.) 584

I.

Ireland *v.* Livingston (Ex. Ch.) 516
Irving *v.* Askew 208

J.

Jones, P. O. *v.* Hill 230
—— *v.* Whittaker 541

K.

Kearney *v.* London, B. and S. C. Railway Company 411
Kenrick, Grice *v.* 340
Kent *v.* Astley 19
Knights *v.* Wiffen 660

L.

Lakemen, Mountstephen *v.* 613
Lancing, New Shoreham *v.* 489
Latter *v.* White 622
Liverpool, Vestry of, Poor Law Commissioners of Ireland *v.* 79
Livingston, Ireland *v.* (Ex. Ch.) 516
Leadgate, Local Board of, North Eastern Railway Company *v.* 157
London, B., and S. C. R. Co., Kearney *v.* 411
London, Chatham, &c. R. Co., Moriarty *v.* 314
Longbottom *v.* Berry 123

M.

PAGE

Marks *v.* Feldman (Ex. Ch.) 275
Marshall *v.* Martin 239
Martin, Marshall *v.* 239
Maudslay, Greenwich *v.* 397
Mercer *v.* Woodgate 26
Metropolitan Board of Works, Doulton *v.* 333
Midland Railway Company, Cliff *v.* 258
Monmouth, Mayor, &c., of, Reg. *v.* 251
Moorecroft, Oake *v.* 76
Moriarty *v.* London, Chatham, &c., Railway Company 314
Mott, Cramer & Co. *v.* 357
Mountstephen *v.* Lakeman 613
Myers, Smith *v.* 429

N.

New Shoreham *v.* Lancing 489
Newcastle, Mayor of, &c., Harland *v.* 47
North Eastern Railway Company *v.* Local Board of Leadgate 157
North of England, &c., Insurance Association *v.* Armstrong 244
Notara *v.* Henderson 346

O.

Oake *v.* Moorecroft 76

P.

Paulet, Dawkins *v.* 94
Pearson, Reg. *v.* 237
Pertwee, Veley *v.* 573
Peters, Denton *v.* 475
Poor Law Commissioners of Ireland *v.* Vestry of Liverpool 79
Portbury, Toleman *v.* (Ex. Ch.) 288
Pratt, Reg. *v.* 176
Preston *v.* Buckley 391
———, Surveyors of the Parish of, Trustees of Brighton, Cuckfield, &c., Turnpike Road *v.* 146
Preston, Mayor of, Gibson *v.* 218

R.

Reg. *v.* Abingdon Union 406
—— *v.* Bolton, Mayor, &c., of 251
—— *v.* Cooper 457
—— *v.* Dean, &c., of Hereford 196
—— *v.* Garland 269
—— *v.* Hulme 377
—— *v.* Monmouth, Mayor, &c. 251
—— *v.* Pearson 237
—— *v.* Pratt 176
—— *v.* St. George-in-the-East 364
—— *v.* St. Mary, Islington 445
—— *v.* St. Thomas' Union 371
—— *v.* Surrey, The Justices of 87, 466
—— *v.* The West Riding, Justices of, (Drake's Case) 33
—— *v.* Whitby Union 325
—— *v.* Wigan, Mayor, &c., of 267
Rhymney, Railway Company, Thomas *v.* 226
Richardson *v.* Du Bois 51
Rigby, Huddart *v.* (Ex. Ch.) 139

S.

Sadler *v.* Smith (Ex. Ch.) 40
St. George-in-the-East, Reg. *v.* 364
St. Mary, Islington, Reg. *v.* 445
St. Thomas Union, Reg. *v.* 371
Short, Ex parte 174
Smith *v.* Myers 429
———, Sadler *v.* (Ex. Ch.) 40
—— *v.* Sydney 203
Snead, Davies *v.* 608
Spurr *v.* Cass 656
Stringer *v.* English and Scottish Marine Insurance Company (Ex. Ch.) 599
Surrey, Justices of, Reg. *v.* 87, 466
Sydney, Smith *v.* 203

T.

PAGE

Thomas *v.* Alsop 151
——— *v.* Rhymney Railway Company 226
Thompson, Allen *v.* 336
Toleman *v.* Portbury (Ex. Ch.) 288
Tubb *v.* Good 443
Tucker, Foster *v.* 224
Turner *v.* Cameron 306

U.

United Ports, &c., Company *v.* Hill 395

V.

Veley *v.* Pertwee 573

W.

PAGE

Webb *v.* Herne Bay Commissioners 642
West *v.* Dobb (Ex. Ch.) 460
West London Railway Company *v.* Fulham 361
West Riding, Justices of the, Reg. *v.* (Drake's Case) 33
Whitby Union, Reg. *v.* 325
White, Latter *v.* 622
Whittaker, Jones *v.* 541
Wiffen, Knights *v.* 660
Wigan, Mayor, &c., of, Reg. *v.* 267
Wincanton, Bruton Turnpike Trustees *v.* 437
Woodgate, Mercer *v.* 26
Woodward *v.* Buchanan 285
Worthy, Allen *v.* 163

TABLE OF CASES CITED.

A.

		PAGE
Ackroyd *v.* Mitchell	3 L. T. (N.S.) 236	135
Adams *v.* Warren Insurance Company	22 Pick. 163	71
Agra Bank *v.* Leighton	Law Rep. 2 Ex. 56	344
Alderson *v.* Temple	4 Burr. 2235	283
Allen *v.* Hayward	7 Q. B. 960	190
Alton *v.* Midland Railway Company	19 C. B. (N. S.) 213	243
Ancona *v.* Marks	7 H. & N. 686	476
Annesley *v.* Earl of Anglesea	17 How. St. Tr. 1139	317, 318, 321
Apothecaries Company, The, *v.* Bentley	Ry. & Mood. 159	291
Appleby *v.* Myers	Law Rep. 2 C. P. 651	548
Arlington *v.* Merricke	2 Wms. Saunders, 411 a.	427
Arthur *v.* Commissioners of Sewers	8 Mod. 331	473
Ashley *v.* Pratt	16 M. & W. 471; Ex. Ch. 1 Ex. 257	589
Astbury, Ex parte	Law Rep. 4 Ch. Ap. 630	139, 310
Aston *v.* Heaven	2 Esp. 533	227
Attersoll *v.* Stevens	1 Taunt. 183	294
Attorney-General *v.* Hitchcock	1 Ex. 91	318
——— *v.* Parnther	3 Bro. C. C. 441	557

B.

Bahia and San Francisco Railway Company	Law Rep. 3 Q.B. 584	649, 650, 653, 654
Ballard *v.* Gerard	1 Salk. 333; Cas. t. Holt, 596	578
Bancroft *v.* Mitchell	Law Rep. 2 Q. B. 549	178
Barclay *v.* Stirling	5 M. & S. 6	66
Barden *v.* De Keverberg	2 M. & W. 61	287
Barker *v.* Hodgson	3 M. & S. 267	546
Barret *v.* Dutton	4 Camp. 333	546
Bartlett *v.* Purnell	4 Ad. & E. 792	343
Barwis *v.* Keppel	2 Wils. 314	100, 119, 121
Bateman *v.* Burge	6 C. & P. 391	28
Bayliffe *v.* Butterworth	1 Ex. 425	528
Beaufort, Duke of, *v.* Bates	3 De G. F. & J. 381	313, 314
Beckham *v.* Drake	9 M. & W. 79	658, 659
Bell, Ex parte	32 L. J. (Bank.) 50	232
Bell *v.* Lord Ingestre	12 Q. B. 317	476
—— *v.* Postlethwaite	5 E. & B. 695	362, 363
Benbow *v.* Jones	14 M. & W. 193	43
Bence *v.* Gilpin	Law Rep. 3 Ex. 76	271

		PAGE
Benson *v.* Chapman	2 H. L. C. 696; 8 C. B. 950	66, 74, 600
Biddle *v.* Bond	6 B. & S. 225	662
Biffin *v.* Yorke	5 M. & G. 428	277, 278
Bilbee *v.* London and Brighton Railway Company	18 C. B. (N. S.) 584	258, 261, 263, 264, 265, 266
Bird *v.* Great Northern Railway Company	28 L. J. (Ex.) 3	413
Birkett *v.* Whitehaven Railway Company	4 H. & N. 730	228
Birkmyr *v.* Darnell	1 Sm. L. C. 5th ed. 262	616
Blackham *v.* Pugh	2 C. B. 611	611
Blagge *v.* New York Insurance Company	1 Caines, 549	592
Blake *v.* Thirst	2 H. & C. 20	501
Bogg *v.* Pearse	10 C. B. 534	578
Bond *v.* Downton	2 Ad. & E. 26	142
Bousfield *v.* Barnes	4 Camp. 228	246, 247
Bowman *v.* Taylor	2 A. & E. 278	647
Boyd *v.* Shorrock	Law Rep. 5 Eq. 72	135, 310
Bracegirdle *v.* Peacock	8 Q. B. 174	142, 143
Brazier *v.* Polytechnic Institution	1 F. & F. 507, 712	189, 191, 196, 507
Briggs *v.* Oliver	4 H. & C. 408	413
Bristow *v.* Booth	Law Rep. 5 C. P. 80	271
Brook *v.* Mitchell	6 Bing. N. C. 349	277, 278
Brooks *v.* Blanshard	1 C. & M. 779	610
——— *v.* Hodgkinson	4 H. & N. 712	205
——— *v.* Macdonnell	1 Y. & C. 500	246
Brown *v.* Royal Insurance Company	1 E. & E. 853	600
Bruce *v.* Jones	1 H. & C. 769	246
Bryan *v.* Child	5 Ex. 368	277
Burmester *v.* Hodgson	2 Camp. 488	546
Burns *v.* Cork and Bandon Railway Company	13 Ir. C. L. Rep. 543	189, 195, 512
Bush *v.* Parker	1 Bing. N. C. 72	141
Buxton *v.* North Eastern Railway Company	Law Rep. 3 Q. B. 549	228, 229
Byrne *v.* Boadle	2 H. & C. 722	412

C.

Cane *v.* Chapman	5 Ad. & E. 647	647
Cargill *v.* Cargill	1 Sw. & Tr. 235	154
Carter *v.* Boehm	3 Bur. 1910	590, 591, 595
Cartwright *v.* Cartwright	1 Phillim. 90	557
——— *v.* Williams	2 Stark. 340	623
Caswell *v.* Groucutt	31 L. J. (Ex.) 361	49
Chambers *v* Manchester and Milford Railway Company	5 B. & S. 588	647
——— *v.* Wiles	24 L. J. (Q.B.) 267	419
Chapman *v.* Cripps	2 F. & F. 864	401
——— *v.* Rothwell	E. B. & E. 168	501
Cherry *v.* Colonial Bank of Australasia	Law Rep. 3 P. C. 24	617
Christie *v.* Griggs	2 Camp. 81	194
Climie *v.* Wood	Law Rep. 3 Ex. 257; Ex. Ch. Law Rep. 4 Ex. 328	137, 138, 139, 310
Cochrane *v.* Green	9 C. B. (N. S.) 448	343, 344
Cockey *v.* Atkinson	2 B. & A. 460	589
Coles *v.* Bristow	Law Rep. 4 Ch. App. 3	484
Collen *v.* Wright	8 E. & B. 647	617

		PAGE
Collett *v.* Foster	2 H. & N. 356	204
Collins *v.* Blantern	1 Sm. L. C. 6th ed. 325	648
Collis *v.* Selden	Law Rep. 3 C. P. 495	190
Cook *v.* Wright	1 B. & S. 559	450, 451, 452
Coombe's Case	Moore, 759; S. C. 8 Vin. Abr. 43, No. 22	556
Cope *v.* Rowlands	2 M. & W. 149	648
Coppin *v.* Craig	7 Taunt. 243	343
Cotton *v.* Bull	Easter Term, 1857, C. P.	358
—— *v.* Wood	8 C. B. (N. S.) 571	413
Coxhead *v.* Richards	2 C. B. 569	609, 611
Crofts *v.* Waterhouse	3 Bing. 319	195, 227
Cullwick *v.* Swindell	Law Rep. 3 Eq. 249	137, 310

D.

D'Arcy *v.* Tamar, &c., Railway Company	Law Rep. 2 Ex. 158	5
Davidson *v.* Willasey	1 M. & S. 313	62, 75
——— *v.* Wood	1 De G. J. & S. 465	52
Dawkins *v.* Lord Rokeby	4 F. & F. 806	99, 100, 106, 119, 122
Dawson *v.* Wilkinson	Cas. t. Hardw. 381	577
Dean *v.* Hornby	3 E. & B. 180	600
De Longuemere *v.* The New York Fire Insurance Company	10 Johns. N. Y. Rep. 120	589, 593
Dell *v.* King	2 H. & C. 84	623
Den *v.* Vancleve	2 Southard, 660	567
Denston *v.* Ashton	Law Rep. 4 Q. B. 590	396
Dent *v.* Smith	Law Rep. 4 Q. B. 414	600
Dew *v.* Clark	3 Add. 79; Haggard's report of judgment, p. 19	557, 561
Dickenson *v.* Jardine	Law Rep. 3 C. P. 639	246
Dickson *v.* Earl of Wilton	1 F. & F. 419	100, 122
Dickson *v.* Lord Combermere	3 F. & F. 527	100, 122
Dines *v.* Wolfe	Law Rep. 2 P. C. 280	43
Doe *v.* Harrison	6 Q. B. 631	271
—— *v.* Tyler	6 Bing. 561	318
—— *v.* Whitehead	8 Ad. & E. 571	291, 294
Dovaston *v.* Payne	2 Sm. L. C. 142, 6th ed.	29
Dumergue *v.* Rumsey	2 H. & C. 777	310
Dye *v.* Leatherdale	3 Wils. 20	143

E.

Edwards *v.* Baugh	11 M. & W. 641	451
Ellison *v.* Isles	11 Ad. & E. 665	142, 143
Elwes *v.* Mawe	2 Sm. L. C. 5th ed. 141	135
Evans *v.* Elliott	5 Ad. & E. 142	358
—— *v.* Rees	9 C. B. (N. S.) 391	240
Everth *v.* Smith	2 M. & S. 278	65, 66

F.

Farina *v.* Home	16 M. & W. 119	663
Farnworth *v.* Hyde	18 C. B. (N. S.) 835	600
Farrow *v.* Mayes	18 Q. B. 516	277

		PAGE
Feise *v.* Wray	3 East, 93	535
Firth *v.* Robinson	1 B. & C. 277	262
Fisher *v.* Dixon	12 Cl. & F. 312	136, 310
—— *v.* Prowse	2 B. & S. 770	28, 31, 32
Fisherwood *v.* Cannon	Cited in 3 T. R. 297	143
Flannagan *v.* Bishopwearmouth	8 E. & B. 451	153, 154, 155, 156
Forbes *v.* Aspinall	13 East, 323	62
Ford *v.* Cotesworth	Law Rep. 4 Q. B. 127	545
Forster *v.* Forster	4 B. & S. 199	472
Forth *v.* Stanton	1 Wms. Saund. 211 b.	616
Foster *v.* Taylor	5 B. & Ad. 887	648
Francis *v.* Cockrell	Law Rep. 5 Q. B. 184	501
Fray *v.* Blackburn	3 B & S. 576	98, 116
Freeman *v.* Cooke	2 Ex. 654; 6 A. & E. 469	648, 650, 653, 654
Furber *v* Sturmey	3 H. & N. 521	210, 212
Furnivall *v.* Coombes	5 M. & G. 736	578

G.

Galloway *v.* Jackson	3 M. & G. 976	55
Garrod *v.* Simpson	3 H. & C. 395	629
Gates *v.* Bayley	2 Wils. 313	143
Gautret *v.* Egerton	Law Rep. 2 C. P. 371	190
George *v.* Chambers	11 M. & W. 149	438
—— *v* Clagett	7 T. R. 359; 2 Sm. L. C. 6th ed. 113	658
—— *v.* Skivington	Law Rep. 5 Ex. 1	194, 515
Gillett *v.* Hill	2 C. & M. 530	662, 666
Glover *v.* Dixon	9 Ex. 158	141, 142, 143, 144
Goldschmidt *v.* Jones	22 L. T. 220	484
Goldsmid *v.* Gillies	4 Taunt. 803	600
Goodman *v.* Chase	1 B. & Ald. 297	617
Gorgier *v.* Mieville	3 B. & C. 45	648
Gosling *v.* Birnie	7 Bing. 339	662
Grant *v.* Gould	2 H. Bl. 69	99, 119
Gratitudine, The	3 Rob. Adm. 240	353, 356
Graves, Ex parte	Law Rep. 3 Ch. Ap. 642	178
Great Northern Railway Company *v.* Mossop	17 C. B. 130	211
Great Western Railway Company *v.* Blake	7 H. & N. 987	227, 228, 229
Greenwood *v.* Greenwood	3 Curt. App. xxx.	557
Griesley's Case	1 Vent. 4	29
Grill *v.* General Iron Screw Collier Company	Law Rep. 1 C. P. 600	351
Grindley *v.* Barker	1 B. & P. 229	5
Grissell *v.* Bristowe	Law Rep. 4 C. P. 36	484
Grote *v.* Chester and Holyhead Railway Company	2 Ex. 251	189, 191, 195, 227, 505, 508, 512, 515
Guidon *v.* Robson	2 Camp. 302	658
Gwynne *v.* Burnell	7 Cl. & F. 641	55

H.

Hacking *v.* Lee	2 E. & E. 906	210, 211
Haley *v.* Hammersley	3 De G. F. & J. 587	135
Hammack *v.* White	11 C. B. (N. S.) 594	413

		PAGE
Hargreaves *v.* Parsons	13 M. & W. 561	617, 620
Harman *v.* Fishar	1 Cowp. 117	278
Harris *v.* Huntbach	1 Burr. 373	617, 618
——— *v.* James	9 East. 82	231, 233, 234, 236
Harrison *v.* Bush	5 E. & B. 344	610
——— *v.* Rowan	3 Washington, 585	566
Harrower *v.* Hutchinson	Law Rep. 4 Q. B. 523	585, 588
Hartnall *v.* The Ryde Commissioners	4 B. & S. 361	221, 223
Harwood *v.* Baker	3 Moo. P. C. 282	568
Hastie *v.* Couturier	9 Ex. 102; 5 H. L. C. 673	432, 433
Hawes *v.* Humble	4 Camp. 327	546
——— *v.* Watson	2 B. & C. 540	662, 665, 666
Haywood *v.* Rogers	4 East, 597	594
Heilbut *v.* Nevill	Law Rep. 4 C. P. 354	278
Hellawell *v.* Eastwood	6 Ex. 295	123, 137, 138, 312, 313
Henly *v.* Mayor, &c., of Lyme	5 Bing. 91	221
Hibblewhite *v.* M'Morine	6 M. & W. 200	484
Hill *v.* Manchester Waterworks	2 B. & Ad. 544	647
Hobson *v.* Middleton	6 B. & C. 295	290, 292
Hodgson *v.* Scarlett	1 B. & A. 232	98
Holdsworth *v.* Wise	7 B. & C. 794	600
Hole *v.* Sittingbourne Railway Company	6 H. & N. 488	189
Hollingham *v.* Head	4 C. B. (N. S.) 388	287
Holmes *v.* Tutton	5 E. & B. 81	342
Home *v.* Bentinck	2 B. & B. 130	98
Horford *v.* Wilson	1 Taunt. 12	318
Horncastle *v.* Suart	7 East, 400	62
Horton *v.* Westminster Commissioners	7 Ex. 780	647, 648
Houstman *v.* Thornton	Holt, N. P. 242	246
Howard *v.* Sheward	Law Rep. 2 C. P. 148	287
Hoyt *v.* Gilman	8 Mass. Rep. 336	591
Humble *v.* Langston	7 M. & W. 517	484
Hutchins *v.* Scott	2 M. & W. 809	358
Hythe, Mayor of, In re	5 A. & E. 832	253

I.

Illidge *v.* Goodwin	5 C. & P. 190	501
Indermaur *v.* Dames	Law Rep. 1 C. P. 274	190
Ionides *v.* Universal Marine Insurance Company	14 C. B. (N. S.) 259	600
Ireland *v.* Livingston	Law Rep. 2 Q. B. 99	520, 528
Irving *v.* Manning	1 H. L. C. 287	246
——— *v.* Richardson	1 Moo. & Rob. 153	246
Isberg *v.* Bowden	8 Ex. 852	343

J.

James *v.* Hayward	Cro. Car. 184	28
Johnson *v.* Macdonald	9 M. & W. 600	433
Johnston *v.* Kershaw	Law Rep. 2 Ex. 82	528
Jones *v.* Cooper	Cowp. 227	617
——— *v.* Huxtable	Law Rep. 2 Q. B. 460	455, 457
——— *v.* Jones	5 D. & L. 628	211

K.

		PAGE
Kearon *v.* Pearson	7 H. & N. 386	546
Keate *v.* Temple	1 B. & P. 158	617
Keighley *v.* Ball	4 F. & F. 799	98
Kell *v.* Nainby	10 B. & C. 20	658, 659
King *v.* Harrison	15 East, 612	205
—— *v.* Shepherd	3 Story, U. S. R. 349	351
Kingston's, Duchess of, Case	2 Sm. L. C. 6 ed. 779	647
Kirk *v.* Nowill	1 T. R. 125	55
Kirkham *v.* Marter	2 B. & Ald. 613	617
Kreuger *v.* Blanck	Law Rep. 5 Ex. 179	527, 537

L.

Lake *v.* King	1 Wm. Saund. 131, b.	98
Lancaster Canal Company *v.* Parnaby	11 A. & E. 223	190
Lane *v.* Dixon	3 C. B. 776	141
Laveroni *v.* Drury	8 Ex. 166	351
Leeds *v.* Wakefield	7 E. & B. 258	328
Leggo *v.* Young	16 C. B. 626	362
Leverson *v.* The Queen	Law Rep. 4 Q. B. 394	5
Lewis *v.* Swansea	5 E. & B. 508	494
Livie *v.* Janson	12 East, 648	600
Llewellyn *v.* Llewellyn	3 D. & L. 318	450
Lloyd *v.* Howard	15 Q. B. 995	475, 476
Longbottom *v.* Berry	Law Rep. 5 Q. B. 137	313
Longmeid *v.* Holliday	6 Ex. 761	194, 501
Lovatt *v.* Hamilton	5 M. & W. 639	433
Lozano *v.* Janson	2 E. & E. 160	600
Lynch *v.* Nurdin	1 Q. B. 29	501

M.

McDougall *v.* Patterson	11 C. B. 755	48
M'Kinnon *v.* Penson	8 Ex. 319; 9 Ex. 609	222
Manby *v.* Witt	18 C. B. 544	610
Mansergh, Re	1 B. & S. 400	98
Maria, The, and Vrow Johanna	4 C. Rob. 348	600
Marston *v.* Allen	8 M. & W. 494	475, 476
Mason *v.* Sainsbury	3 Doug. 61	246
Mather *v.* Fraser	2 K. & J. 536	137, 138
Matson *v.* Wharam	2 T. R. 80	617, 618
Maxted *v.* Paine	Law Rep. 4 Ex. 81	484
May *v.* Harvey	13 East, 197	425
Millar *v.* Palmer	1 Curt. 540	577
Miller *v.* Race	1 Sm. L. C. 6th ed. 468	648
Mizen *v.* Pick	3 M. & W. 481	52
Monprivatt *v.* Smith	2 Camp. 175	143
Montoya *v.* London Assurance Company	6 Ex. 451	600
Morant *v.* Chamberlin	6 H. & N. 541	29
Morgan *v.* Brundrett	5 B. & Ad. 289	283
Morton *v.* Copeland	16 C. B. 517	291
Much Hoole *v.* Preston	17 Q. B. 548	367

		PAGE
Mullett *v.* Shedden	13 East, 304	600
Muschamp *v.* Lancaster, &c., Railway Company	8 M. & W. 430	228

N.

Niagara *v.* Cordes	21 Howard, U.S.R. 7	351
Noden *v.* Johnson	16 Q. B. 218	141
Norman *v.* Wescombe	2 M. & W. 349	143

P.

Palmer *v.* Naylor	10 Ex. 382	600
Palmer's Shipbuilding and Iron Company *v.* Chaytor	Law Rep. 4 Q. B. 209	21
Parr *v.* Lillicrap	1 H. & C. 615	419
Parsons *v.* Hind	14 W. R. 860	135
——— *v.* St. Mathew, Bethnal Green	Law Rep. 3 C. P. 56	221, 223, 224
Paterson *v.* Paterson	Law Rep. 2 Eq. 31	271
Pelham *v.* Pickersgill	1 T. R. 660	27
Philips *v.* Biron	1 Str. 509	205
Phillips *v.* Howgate	5 B. & A. 220	141
Philpott *v.* Swann	11 C. B. (N.S.) 270	600
Pickard *v.* Sears	6 A. & E. 469	650, 662
——— *v.* Smith	10 C. B. (N.S.) 480	191
Pike *v.* Polytechnic Institution	1 F. & F. 507, 712	189, 191, 507
Pilcher *v.* Stafford	4 B. & S. 775	165, 166, 167, 168 169, 172
Place *v.* Fagg	4 M. & R. 277	135
Polytechnic Cases	1 F. & F. 507, 712	189
Poole *v.* Huskinson	11 M. & W. 830	32
Potter *v.* Rankin	Law Rep. 3 C. P. 562	66, 67
Pratt *v.* Pratt	2 Ex. 413	143
Prentice *v.* Harrison	4 Q. B. 852	204
Pritchard *v.* Long	9 M. & W. 666	143
Prosser *v.* Watts	6 Madd. 59	214, 217

Q.

Quarman *v.* Burnett	6 M. & W. 499	228
Quebec Assurance Company *v.* St. Louis	7 Moo. P. C. 286	246
Queen's Case, The	2 B. & B. 302	318

R.

Randal *v.* Cockran	1 Ves. Sen. 98	246, 247
Randall *v.* Lynch	2 Camp. 352; 12 East, 179	546
Read *v.* Legard	6 Ex. 636	52
Redhead *v.* Midland Railway Company	Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379	188, 189 190, 192, 193, 194, 228 503, 504, 507, 513

K.

		PAGE
Kearon *v.* Pearson	7 H. & N. 386	546
Keate *v.* Temple	1 B. & P. 158	617
Keighley *v.* Ball	4 F. & F. 799	98
Kell *v.* Nainby	10 B. & C. 20	658, 659
King *v.* Harrison	15 East, 612	205
—— *v.* Shepherd	3 Story, U. S. R. 349	351
Kingston's, Duchess of, Case	2 Sm. L. C. 6 ed. 779	647
Kirk *v.* Nowill	1 T. R. 125	55
Kirkham *v.* Marter	2 B. & Ald. 613	617
Kreuger *v.* Blanck	Law Rep. 5 Ex. 179	527, 537

L.

Lake *v.* King	1 Wm. Saund. 131, b.	98
Lancaster Canal Company *v.* Parnaby	11 A. & E. 223	190
Lane *v.* Dixon	3 C. B. 776	141
Laveroni *v.* Drury	8 Ex. 166	351
Leeds *v.* Wakefield	7 E. & B. 258	328
Leggo *v.* Young	16 C. B. 626	362
Leverson *v.* The Queen	Law Rep. 4 Q. B. 394	5
Lewis *v.* Swansea	5 E. & B. 508	494
Livie *v.* Janson	12 East, 648	600
Llewellyn *v.* Llewellyn	3 D. & L. 318	450
Lloyd *v.* Howard	15 Q. B. 995	475, 476
Longbottom *v.* Berry	Law Rep. 5 Q. B. 137	313
Longmeid *v.* Holliday	6 Ex. 761	194, 501
Lovatt *v.* Hamilton	5 M. & W. 639	433
Lozano *v.* Janson	2 E. & E. 160	600
Lynch *v.* Nurdin	1 Q. B. 29	501

M.

McDougall *v.* Patterson	11 C. B. 755	48
M'Kinnon *v.* Penson	8 Ex. 319; 9 Ex. 609	222
Manby *v.* Witt	18 C. B. 544	610
Mansergh, Re	1 B. & S. 400	98
Maria, The, and Vrow Johanna	4 C. Rob. 348	600
Marston *v.* Allen	8 M. & W. 494	475, 476
Mason *v.* Sainsbury	3 Doug. 61	246
Mather *v.* Fraser	2 K. & J. 536	137, 138
Matson *v.* Wharam	2 T. R. 80	617, 618
Maxted *v.* Paine	Law Rep. 4 Ex. 81	484
May *v.* Harvey	13 East, 197	425
Millar *v.* Palmer	1 Curt. 540	577
Miller *v.* Race	1 Sm. L. C. 6th ed. 468	648
Mizen *v.* Pick	3 M. & W. 481	52
Monprivatt *v.* Smith	2 Camp. 175	143
Montoya *v.* London Assurance Company	6 Ex. 451	600
Morant *v.* Chamberlin	6 H. & N. 541	29
Morgan *v.* Brundrett	5 B. & Ad. 289	283
Morton *v.* Copeland	16 C. B. 517	291
Much Hoole *v.* Preston	17 Q. B. 548	367

		PAGE
Mullett *v.* Shedden	13 East, 304	600
Muschamp *v.* Lancaster, &c., Railway Company	8 M. & W. 430	228

N.

Niagara *v.* Cordes	21 Howard, U.S.R. 7	351
Noden *v.* Johnson	16 Q. B. 218	141
Norman *v.* Wescombe	2 M. & W. 349	143

P.

Palmer *v.* Naylor	10 Ex. 382	600
Palmer's Shipbuilding and Iron Company *v.* Chaytor	Law Rep. 4 Q. B. 209	21
Parr *v.* Lillicrap	1 H. & C. 615	419
Parsons *v.* Hind	14 W. R. 860	135
——— *v.* St. Mathew, Bethnal Green	Law Rep. 3 C. P. 56	221, 223, 224
Paterson *v.* Paterson	Law Rep. 2 Eq. 31	271
Pelham *v.* Pickersgill	1 T. R. 660	27
Philips *v.* Biron	1 Str. 509	205
Phillips *v.* Howgate	5 B. & A. 220	141
Philpott *v.* Swann	11 C. B. (N.S.) 270	600
Pickard *v.* Sears	6 A. & E. 469	650, 662
——— *v.* Smith	10 C. B. (N.S.) 480	191
Pike *v.* Polytechnic Institution	1 F. & F. 507, 712	189, 191, 507
Pilcher *v.* Stafford	4 B. & S. 775	165, 166, 167, 168 169, 172
Place *v.* Fagg	4 M. & R. 277	135
Polytechnic Cases	1 F. & F. 507, 712	189
Poole *v.* Huskinson	11 M. & W. 830	32
Potter *v.* Rankin	Law Rep. 3 C. P. 562	66, 67
Pratt *v.* Pratt	2 Ex. 413	143
Prentice *v.* Harrison	4 Q. B. 852	204
Pritchard *v.* Long	9 M. & W. 666	143
Prosser *v.* Watts	6 Madd. 59	214, 217

Q.

Quarman *v.* Burnett	6 M. & W. 499	228
Quebec Assurance Company *v.* St. Louis	7 Moo. P. C. 286	246
Queen's Case, The	2 B. & B. 302	318

R.

Randal *v.* Cockran	1 Ves. Sen. 98	246, 247
Randall *v.* Lynch	2 Camp. 352; 12 East, 179	546
Read *v.* Legard	6 Ex. 636	52
Redhead *v.* Midland Railway Company	Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379	188, 189 190, 192, 193, 194, 228 503, 504, 507, 513

		PAGE
Rex or Regina:		
—— *v.* Aire and Calder Navigation Company	9 B. & C. 820; 3 B. & Ad. 139	494, 495
—— *v.* All Saints, Derby	14 Q. B. 207	83, 85
—— *v.* Axmouth	8 East, 383	374
—— *v.* Bennett	3 E. & B. 341	366
—— *v.* Berry	28 L. J. (M.C.) 89	179
—— *v.* Bowman	6 C. & P. 337	5
—— *v.* Bramley	Bur. Set. Ca. 75	374, 375
—— *v.* Brighton	4 E. & B. 236	328
—— *v.* Bristol and Exeter Railway Company	11 Ad. & E. 202, n.	468
—— *v.* Cambridgeshire	4 Ad. & E. 111	468
—— *v.* Charlesworth	16 Q. B. 1012	28
—— *v.* Christchurch	8 B. & C. 660	374, 375
—— *v.* Cottingham	7 B. & C. 615	82, 83, 85, 86, 366
—— *v.* Cross	3 Camp. 224	29
—— *v.* Everton	2 E. & E. 771	374, 375
—— *v.* Faversham Navigation Company	31 J. P. 822	494
—— *v.* Flintan	1 B. & Ad. 227	154
—— *v.* Freke	5 E. & B. 944	225
—— *v.* Glossop	Law Rep. 1 Q. B. 227	328, 408, 409
—— *v.* ———	12 Q. B. 117	367, 369
—— *v.* Halifax	12 Q. B. 111	329
—— *v.* Hanson	4 B. & A. 519	89
—— *v.* Hartfield	17 Q. B. 746	329
—— *v.* Harwich, Mayor of	8 A. & E. 919	253
—— *v.* Hexham	5 A. & E. 559	271
—— *v.* Hillingdon	18 Q. B. 718	458, 459
—— *v.* Horner	2 B. & Ad. 150	469
—— *v.* Hutchinson	4 E. & B. 200	437, 438, 439, 440, 441, 442
—— *v.* Islip	1 Str. 423	330
—— *v.* Jones	12 Ad. & E. 684	469
—— *v.* Kenyon	6 B. & C. 640	469
—— *v.* Lancashire	7 E. & B. 839	543, 544
—— *v.* Leake	5 B. & Ad. 469	401
—— *v.* Lee	Law Rep. 1 Q. B. 241	135
—— *v.* Leeds	4 B. & A. 498	85
—— *v.* Leicester, Freemen of	15 Q. B. 671	255, 256, 257
—— *v.* Manchester and Leeds Railway Company	8 Ad. & E. 413	468
—— *v.* Mersey and Irwell Navigation Company	9 B. & C. 95	494
—— *v.* Middlesex Justices	5 B. & Ad. 1113	5
—— *v.* Mortlock	7 Q. B. 459	178
—— *v.* Much Hoole	17 Q. B. 548	83, 86
—— *v.* Newborough	Law Rep. 4 Q. B. 585	468, 473
—— *v.* Northampton	2 M. & S. 262	30
—— *v.* North and South Shields Ferry Company	1 E. & B. 140	495
—— *v.* Pagham Commissioners	8 B. & C. 355	401
—— *v.* Paul	2 Mood. & Rob. 307	401
—— *v.* Payn	34 L. J. (Q.B.) 59	4
—— *v.* Polsted	2 Str. 1263	4
—— *v.* Pudding Norton	33 L. J. (M.C.) 136	469
—— *v.* Richards	20 J. P. 68	238
—— *v.* St. Alban's	22 L. J. (M.C.) 142	438
—— *v.* St. Andrew's, Holborn	17 Q. B. 746	329

		PAGE
Rex or Regina :		
—— *v.* St. George, Hanover Square	3 Camp. 222	223
—— *v.* St. Giles, Cripplegate	17 Q. B. 636	86
—— *v.* St. Leonard, Shoreditch	Law Rep. 1 Q. B. 21	328
—— *v.* St. Mary, Islington	3 B. & S. 46	329
—— *v.* St. Marylebone	16 Q. B. 352	367, 370
—— *v.* St. Sepulchre	1 E. & E. 813	366
—— *v.* Salop, Justices of	29 L. J. (M.C.) 39	469
—— *v.* Seend	12 Q. B. 133	329
—— *v.* Sheffield Railway Company	11 Ad. & E. 194	468
—— *v.* South Holland Drainage Committee	8 Ad. & E. 429	469, 473
—— *v.* South Shields	3 E. & B. 606	440
—— *v.* Stapleton	1 E. & B. 766	328
—— *v.* Stock	8 Ad. & E. 405	89
—— *v.* Sudbrooke	4 East, 356	330
—— *v.* Surrey, Justices of	2 T. R. 504	89
—— *v.* Sutton	5 T. R. 657	330
—— *v.* Tacolnestone	12 Q. B. 157	328
—— *v.* Taunton, St. Mary	3 M. & S. 465	474
—— *v.* Turner	5 M. & S. 206	291
—— *v.* West Riding, Justices of	6 B. & S. 531	362, 363
—— *v.* Westrington	H. T. 23 G. 2, MSS	4
—— *v.* Whissendine	2 Q. B. 450	328
—— *v.* Whiteley	3 H. & N. 143	175
—— *v.* Wilson	10 B. & C. 80	271, 273
Robertson *v.* Gantlett	16 M. & W. 289	143
Robinson *v.* Rutter	4 E. & B. 954	342, 343, 344, 345
Rochester, Mayor of, *v.* Reg.	E. B. & E. 1024	253, 255, 257
Rodgers *v.* Forresters	2 Camp. 483	546
Roe d. Wood *v.* Doe	2 T. R. 644	362
Rosetto *v.* Gurney	11 C. B. 176	600
Rossi *v.* Bailey	Law Rep. 3 Q. B. 621	58, 232
Roux *v.* Salvador	3 Bing. N. C. 287	600
Russell *v.* Men of Devon	2 T. R. 667	221, 222

S.

St. George, Hanover Square, *v.* Cambridge Union	Law Rep. 3 Q. B. 1	374
Scott *v.* London Dock Company	34 L. J. (Ex.) 17; Ex. Ch. 34 L. J. (Ex.) 220; 3 H. & C. 596	412
—— *v.* Stansfield	Law Rep. 3 Ex. 220	98, 116
Sellar *v.* M'Vicar	1 B. & P. (N.R.) 23	64
Sharp *v.* Eneleigh	20 L. J. (Ex.) 282	48
—— *v.* Grey	9 Bing. 457	195, 512
Shepherd *v.* Murphy	2 Ir. Law Rep. Eq. 544	484
—— *v.* Payne	12 C. B. (N.S.) 414; 16 C. B. (N.S.) 132	573, 575, n. 577, 578, 579, 580, 581, 582, 583
Simpson *v.* Mirabita	Law Rep. 4 Q. B. 257	233
Sloan *v.* Maxwell	2 H. W. Green (New Jersey Ch. Rep.) 563	566, 568
Smith *v.* Brown	5 Dowl. 736	56, 57
—— *v.* Edwards	4 Dowl. 621	56
—— *v.* Great Eastern Railway Company	Law Rep. 2 C. P. 10	413
—— *v.* Marrable	11 M. & W. 5	501

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXIII VICTORIA.

FITZGERALD'S CASE.

1869
Nov. 3.

Adjournment of Court—Parliament—Corrupt Practices at Elections—Power of Commissioners to hold Meetings without Adjournment—15 & 16 *Vict. c.* 57, *s.* 4.

By 15 & 16 Vict. c. 57, s. 4, the commissioners appointed under the Act to inquire into the existence of corrupt practices at an election for any county or borough, shall, within a reasonable time after their appointment, go to such county or borough, and shall from time to time hold meetings for the purposes of the inquiry at some convenient place within the same or within ten miles thereof, and shall have power to adjourn such meetings from time to time and from any one place to any other place within such county or borough, or within ten miles thereof:—

Held, that the commissioners have power to hold meetings from time to time without any formal adjournment.

Quære, whether, if a formal adjournment were necessary, an adjournment by two out of three commissioners, in the absence of the third, but with his express assent, would not be a valid adjournment.

A WRIT of habeas corpus having been issued to the keeper of the gaol at York to bring up the body of Charles Edward

1869

FITZGERALD'S CASE.

Fitzgerald, the prisoner was brought up accordingly; and the keeper returned that Fitzgerald had been committed into his custody under a warrant dated the 21st of October, 1869, under the hands and seals of the three commissioners appointed by the Queen, pursuant to 15 & 16 Vict. c. 57, to inquire into the alleged corrupt practices at the late parliamentary election for the borough of Beverley, for contempt of the commissioners on the above day, in refusing to be sworn and give evidence; and by the warrant Fitzgerald was ordered to be imprisoned for two months, unless he should in the meantime consent to be sworn.

It appeared from the affidavits, filed in support of the motion for the discharge of the prisoner from custody and in opposition, that by warrant under the sign manual, dated the 23rd of June, 1869, reciting the address of both houses of parliament, in pursuance of the power vested in the Queen, under 15 & 16 Vict. c. 57, Her Majesty appointed three barristers commissioners, for the purpose of making inquiry into the existence of the corrupt practices found by the report of one of the election petition judges to have existed at the last parliamentary election for the borough of Beverley.

The three commissioners having duly given notice of their first meeting, held sittings by adjournment from time to time, up to the 25th of September. A day or two previous to that day they had obtained the written consent of the Secretary of State for the Home Department to adjourn the inquiry from the 27th of September to the 19th of October. And the three commissioners accordingly on the receipt of this consent agreed to sit on the 25th of September, to which day the inquiry stood adjourned; and to adjourn from that day to the 27th of September, and from the 27th of September to the 19th of October. The three commissioners met on the 25th of September, and then adjourned to the 27th; on that day only two of the commissioners were present, and they took evidence and then adjourned the inquiry to the 19th of October. The three commissioners met on that day, and again by adjournment on the 20th and 21st of October. On the latter day Fitzgerald refused to be sworn as a witness, on the ground that the commissioners had no jurisdiction, owing, as he contended,

to the informal adjournment by two only of the three commissioners on the 27th of September. (1)

Sir J. B. Karslake, Q.C. (with him *Sleigh, Serjt.*, and *J. Morgan Howard*), in support of the motion to discharge the prisoner. The adjournment on the 27th of September was informal and invalid, being by two only of the commissioners in the absence of the third. The warrant under which the three commissioners were appointed does not specify their duties or the mode of discharging them, it simply appointed the three by name, in pursuance of the powers of 15 & 16 Vict. c. 57, to make the inquiry. The number of

(1) By 15 & 16 Vict. c. 57, s. 1, as amended by 31 & 32 Vict. c. 125, s. 15: Where, by a joint address of both Houses of Parliament, it shall be represented to the Queen, that a judge has reported that there is reason to believe that corrupt practices have extensively prevailed at the parliamentary election in any county or borough, and the Houses shall thereupon pray Her Majesty to cause inquiry to be made under the Act by persons named in such address, such persons being barristers of not less than seven years standing, "it shall be lawful for Her Majesty, by warrant under her royal sign manual, to appoint the said persons to be commissioners for the purpose of making inquiry into the existence of such corrupt practices; and in case any of the commissioners so appointed die, resign, or become incapable to act, it shall be lawful for the surviving or continuing commissioners or commissioner to act in such inquiry as if they or he had been solely appointed to be commissioners or a sole commissioner for the purposes of such inquiry, and (as to such sole commissioner) as if this Act had authorized the appointment of a sole commissioner; and all the provisions of this Act concerning the commissioners appointed to make any such inquiry shall be taken to apply to such surviving or continuing commissioner or commissioners."

s. 4: "The commissioners appointed under this Act to make inquiry as aforesaid in relation to any county, division of a county, city, borough, university, or place, shall, upon their appointment, or within a reasonable time afterwards, go to such county, division of a county, city, borough, university, or place, and shall from time to time hold meetings for the purposes of such inquiry at some convenient place within the same, or within ten miles thereof, and shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, division of a county, city, borough, university, or place, or within ten miles thereof, as to them may seem expedient; and such commissioners shall give notice of their appointment, and of the time and place of holding their first meeting, by publishing the same in a newspaper in general circulation in such county, division of a county, city, borough, university, or place, or the neighbourhood thereof: Provided always, that such commissioners shall not adjourn the inquiry for any period exceeding one week, without the consent and approbation of one of Her Majesty's principal Secretaries of State."

1869

FITZGERALD'S CASE.

the commissioners is left open by the statute, s. 1. But it is clear from the various sections of the statute that whatever the number appointed, the whole must act together to make their acts valid, except in certain specified cases, and these very exceptions prove the rule. Section 4 is the most material section, which enables *the* commissioners to hold the inquiry from time to time, and to adjourn their meetings from time to time and from place to place. But s. 1 shews most distinctly by the proviso that all the commissioners must act together, except in the case of the death, resignation, or inability of any one of them to act, in which case the remaining commissioners may continue to act as if they had been the only commissioners appointed. Sections 5, 6, 7 all use the words "the commissioners," but s. 8, where the acts to be done can as well be performed by one, enables one to act, as in the case of summoning witnesses under the hand and seal of any one of them. Sections 9 and 10, again, though repealed by 26 Vict. c. 29, s. 10, sch., shew that any judicial act can only be done by all the commissioners, such as granting a certificate. But a merely ministerial act, such as administering an oath, may be done by any one of them, s. 11. Lastly, s. 12 gives the power of committing to the commissioners, and not to one or a major part of them. The language of this statute may be contrasted with that of 3 & 4 Wm. 4, c. 2, s. 8, where all the powers of the commissioners, including that of adjournment, may be exercised by the major part of them. It is clear, therefore, that judicial acts must be done by all the commissioners. An adjournment is a judicial act; and it has been laid down by many authorities that an adjournment can only be valid if done by the number required to do any other judicial act. Thus in all the text-books, such as 5 Burn's Justice, tit. Sessions of the Peace, p. 947 (29th ed.), and 2 Bott's Poor Laws, (6th ed.), pl. 981, citing *Rex* v. *Westrington* (H. T. 23 G. 2, MSS.), it is said if there are not enough justices to hold a session there are not enough to adjourn it legally, and every act done after such adjournment is void. *Rex* v. *Polsted* (1) and *Reg.* v. *Payn* (2) are to the same effect. A special commission of Parke, J., and others, was appointed to try certain prisoners who had been, in the opinion of the judges, illegally convicted before the sessions owing

(1) 2 Str. 1263. (2) 34 L. J. (Q.B.) 59.

to the want of a formal adjournment in the presence of a quorum of justices. (1) And one of the prisoners convicted at the sessions, on the proceedings being set out on the record at the second trial, was held not to have sustained his plea of autrefois convict: *Rex* v. *Middlesex Justices* (2) and *Rex* v. *Bowman.* (3) But it will be said the adjournment of the commissioners, though a judicial act, is of such a nature that it may be done in the absence of one, if with his express assent: *D'Arcy* v. *Tamar, &c., Ry. Co.* (4) is a direct authority to the contrary.

[COCKBURN, C.J. That argument assumes a formal adjournment necessary, the statute gives the commissioners power to hold the inquiry from time to time.]

Section 4 no doubt gives such a power, but the mode in which it is to be exercised is expressly pointed out, viz., by adjournment. And the latter part of the section, which only requires notice to be given of the first meeting, strengthens the argument in favour of this construction: for, if no adjournment is necessary, the commissioners can hold any meeting after the first without any notice at all being given of the when and where. The proviso at the end of the section is also in favour of this view, as it treats any meeting, after the first, as an adjournment of the inquiry.

Sir R. P. Collier, A. G., and *Archibald*, shewed cause. The argument in support of the rule is based on the mistaken analogy between the meetings of commissioners with power to hold an inquiry from time to time and the holding of courts fixed for a particular day, which can only be continued over that day by formal adjournments. *Leverson* v. *The Queen* (5) shews that the principle applicable to quarter sessions does not apply to the meetings of commissioners. The acts of the majority of a body of persons commissioned to do anything of a public nature will bind, and be considered the act of all: *Grindley* v. *Barker.* (6)

[COCKBURN, C.J. That argument amounts to saying that a majority of the commissioners could do all acts in the absence of the minority. I should want strong arguments to convince me that that proposition was tenable, and it is quite unnecessary to go

(1) See 6 C. & P. 90.
(2) 5 B. & Ad. 1113.
(3) 6 C. & P. 337.
(4) Law Rep. 2 Ex. 158.
(5) Law Rep. 4 Q. B. 394.
(6) 1 B. & P. 229.

1869

FITZGERALD'S CASE.

that length in the present case; but it may well be that such an act as adjournment might be done, if with the consent of all, in the absence of one of the commissioners.]

The necessity of an adjournment can only arise from the enactments of the statute; and s. 4 expressly gives the commissioners power to hold the inquiry from time to time. The meeting of the 19th of October, therefore, having been held with the sanction of the Secretary of State at a longer interval than a week from the last meeting, was valid without any formal adjournment, and, consequently, what took place on the 27th of September is immaterial.

Sir J. B. Karslake, Q.C., in reply.

COCKBURN, C.J. I am of opinion that the return is good, and that the application to discharge the prisoner from custody must be refused. The prisoner has been, according to the return, committed for contempt of the commissioners at a meeting held on the 21st of October, and the question which we have to decide is, whether this was a valid meeting, or whether the powers of the commissioners were at that time extinguished by what had previously taken place. It is admitted that the meeting of the 25th of September, held by the three commissioners, was a valid and legal meeting. It is a fact before us upon the affidavits that, before the 25th of September, the three commissioners had concurred in an application to the Secretary of State for his sanction, as required by the Act of Parliament, to enable them to adjourn the inquiry at the meeting, which was to take place on the 27th of September, until the 19th of October. The application was acceded to by the Secretary of State. And although upon the 27th of September two commissioners only were present, it is clear that the three commissioners concurred in the adjournment from the 27th of September until the 19th of October. It is said that the whole proceedings at the meetings which followed were illegal and void. I think it unnecessary to decide the question, though I am very far indeed, as at present advised, from concurring with the Attorney General that it is competent (except in case of incapacity, as pointed out by the Act of Parliament), to any other than the full number of commissioners to exercise the powers vested in

1869

FITZGERALD'S CASE.

them. I will assume, for the present purpose, that the proceedings at the meeting of the 27th of September were void in consequence of the absence, otherwise than from incapacity, of one of the commissioners. I will assume with Sir John Karslake, that the adjournment to the 19th of October was invalid, inasmuch as, if an adjournment is required by the 4th section of the statute, the adjournment must be the act of the court, and the court must consist of the full number of the commissioners. It did not consist of that number of commissioners upon that day. But if it were necessary, in my view of the case, to consider whether an act of adjournment in which the three commissioners concurred might not be performed by the two, I should most undoubtedly require a good deal more to satisfy me than I have heard that such an act done by two commissioners in the absence of the third would not be valid. I do not think it necessary, however, to rest my decision upon that ground. I place my judgment upon the broad proposition that an adjournment was not necessary; and I say so with reference to the particular language and provisions of this Act of Parliament. We are not dealing with a court of justice, nor with any powers to be exercised upon a specified and particular day, in which case an adjournment is necessary, if the powers are to be exercised beyond the day upon which they are appointed to be exercised. No doubt, as regards courts of justice, where the judicial duty is to be performed upon a fixed and given day, although there is a power of prolonging the functions of the court in a judicial inquiry from the particular day to the next day, or the following day, so long as is necessary for the purposes of the court, that power of adjournment must be exercised according to certain well known and established forms. And if we were dealing with such a court there could be no doubt, if the adjournment had not been made according to those well established and legal forms, that the judicial functions of the court are gone. Sir John Karslake produced abundant authority to that effect. If this were a court of justice, and assuming that what was done here by the two commissioners could only be done by the three, those authorities would be sufficient to shew that the adjournment which took place on the 27th of September, was not a valid adjournment, and therefore the court had ceased to exist. But in this case the

1869

FITZGERALD'S CASE.

tribunal is of another character. The adjournment here was an adjournment by commissioners, not constituting a court of justice, but exercising their functions under the particular terms of an Act of Parliament, and I can only look to the terms of that Act of Parliament to see in what way those functions are to be exercised, and what are the limitations to the exercise of those functions. These commissioners are, by s. 4, authorized and empowered to hold meetings from time to time. It is not one meeting on a fixed and particular day which requires an adjournment in order to enable the persons intrusted with the powers to exercise them, but they are to hold meetings from time to time; and I apprehend, if nothing further had been said about adjournment, it would be too clear to admit of argument to the contrary, that they might have held a meeting to-day, passed over to-morrow, and held a meeting on the third day, and so on without any adjournment at all, though a notice of the next intended meeting might have been given, as propriety and common justice would have suggested, not as a matter of legal obligation. But the difficulty is, there has been introduced, after the power of holding meetings from time to time, the power of adjournment. The introduction of the power of adjournment would seem to be merely superfluous and unnecessary, as it was involved, by implication, in the power of holding meetings from time to time. I think, at all events, that we must not regard this particular power of adjournment so given as cutting down the previous power of holding meetings from time to time. The clause may have got in in this way,—whereas in the ordinary course such an inquiry is held, and it was the intention of the legislature that it should be held in general, at the particular place where the matter arose, yet there may be exceptional cases, and therefore the provision is introduced giving the commissioners power to hold the inquiry at the particular borough or place which is the subject matter of inquiry; or they may, if necessary, adjourn it from one place to another within a limited and prescribed distance. But the introduction of such a provision does not cut down the power of holding the meetings for the inquiry from time to time as expediency and convenience suggest. Then comes the further provision,—which seems to meet all the objections which Sir John Karslake suggested as likely to

arise from an unfettered power of holding meetings without any limitation whatever as to time,—that, though the commissioners may hold meetings from time to time, yet they shall not allow an interval of more than a week to elapse between any one meeting and the next, unless they get the sanction of the Secretary of State. They must give notice of their first meeting, of the time and the place at which they are about to hold it, and they may hold meetings from time to time; and the legislature seem to have given credit to the commissioners, that they would not commit such an outrage upon all propriety, as to deceive and mislead the persons interested in the inquiry as to the time and place, by holding meetings without notice.

It seems to me that is the true construction of the Act of Parliament; and therefore, though it should turn out that Sir John Karslake's argument is well founded, when he says that the proceedings of the 27th of September were irregular, as contrary to the powers of the statute, and, in consequence, void, and that whatever happened on that day must be considered as invalid, yet, as the meeting on the 19th of October was held within the time to which the Secretary of State had given his official and formal assent, it was competent to the commissioners (notwithstanding any informality in the notice of adjournment) to start afresh and hold their meeting on the 19th of October, to which day they had informally adjourned. If, in consequence of a sufficient notice not having been given of the holding of the meetings which followed the 19th of October, at one of which the contempt was committed, the witness whose presence had been required had been deceived as to the time or place of holding the meeting, that would have been a strong reason why a contempt should not have been held to have been committed, and why, therefore, the commissioners ought not to have proceeded to commit the person to prison. But the simple question before us is, whether the meeting of the 19th of October, and the meetings which followed it by regular adjournments, and the validity of which, therefore, depend upon the validity of the meeting of the 19th of October, were valid. In my opinion they were; and inasmuch as it was at one of those meetings that the contempt was committed, and inasmuch as it was within the competence of the commissioners to commit for

1869

FITZGERALD'S CASE.

that contempt, I think that the prisoner should be remitted to custody.

MELLOR, J. I am entirely of the same opinion. The prisoner appears to have been most undoubtedly guilty of contempt, assuming the commissioners to have had jurisdiction. Whether or not they had jurisdiction depends upon the construction of the Act of Parliament, and when we are to construe an Act which creates a new tribunal for special purposes, we cannot try the case by analogy to regular courts of justice, but we must look at the powers committed to the new tribunal, the commissioners. At the beginning of the 1st section Her Majesty is empowered to appoint persons of certain standing at the bar as commissioners for the purpose of making inquiry as to the existence of corrupt practices. That is the object of the appointment, and that is the scope of the inquiry. The 4th section says, "The commissioners appointed under the Act to make inquiry in relation to any county or borough, &c., shall, upon their appointment, or within a reasonable time afterwards, go to such county or borough, and shall from time to time hold meetings for the purposes of such inquiry at some convenient place within the same, or within ten miles thereof." If the section had stopped there, it is perfectly clear the most complete authority would have been given to the commissioners to hold meetings from time to time. The words that follow are not intended to restrain the commissioners' power, they are intended to enlarge rather than restrain the power. They are quite unnecessary, as it appears to me, but it is quite clear that it was not intended to restrain the power previously given to hold meetings from time to time. The word "adjourn" must be construed with reference to the object of the context, and with reference to the object of the inquiry. What might in certain Acts of Parliament require a technical interpretation, where adjournments are well understood, as, for instance, relating to courts of justice, does not apply to inquiries of this nature. Inquiries of this nature cannot be performed without holding meetings from time to time; and I think, when the power of holding those meetings is given, that the word "adjourn" must be taken as used in the popular sense of deferring or postponing the inquiry to a future day. The only

restriction to that power I can find is this, "that such commissioners shall not adjourn the inquiry for any period exceeding one week without the consent and approbation of one of Her Majesty's principal Secretaries of State." That is to say, the inquiry shall not hang over the borough for an indefinite period; but if the commissioners want to put off the inquiry for a longer period than a week, they must get the consent of the Secretary of State. It seems to me, construing the word in its popular sense, that there was no necessity whatever for any formal adjournment of the proceedings. It is immaterial, therefore, to inquire whether, on the 27th of September, the act done by the commissioners was a valid act or not, and I purposely abstain from expressing any decided opinion as to the powers of the commissioners. I am, however, inclined to agree, as at present advised, that when the object of the inquiry is carried into effect by the examination of witnesses by three commissioners, the two commissioners might with propriety have done what they did as to adjournment. The question may arise on some future occasion as to the powers of the commissioners, whether or not they have the larger authority contended for by the Attorney General; but certainly there is a strong colour given to that contention by the 5th section, which says, "such commissioners shall, by all such lawful means as to them appear best, with a view to a discovery of the truth, inquire into the manner in which the election in relation to which such committee as aforesaid may have reported to the House of Commons," and so on, "has been conducted." It does seem to give a considerable discretion to the commissioners as to the mode in which they will conduct the inquiry; but whether that is sufficient to enable them to act as contended for by the Attorney General I do not express an opinion, because it is unnecessary. I am perfectly satisfied to rest my decision upon the grounds already stated by my Lord Chief Justice, in which I entirely concur, and therefore I agree that the prisoner must be remitted to custody.

LUSH, J. I am quite of the same opinion. It is clear that the postponement from the 27th of September to the 19th of October was really the joint act of all three commissioners, that act being sanctioned by the Secretary of State. I therefore do not think it

1869

FITZGERALD'S CASE.

necessary to express an opinion whether, if that had been the act of two only, the commission would or would not have expired. That question does not arise; and the argument is therefore reduced to one of a purely technical character founded upon s. 4. Numerous cases have been cited with reference to courts of quarter sessions and other courts of justice, to which the technical meaning of the word "adjourn" has been held to apply. I am of opinion there is no analogy between the two cases; that the word "adjourn" is not used in its technical sense, as it is used when applied to proceedings of courts of justice, where the authority of holding a meeting is on a given day, but where the law implies an authority to create, as it were, a special extension of that period when it is needful for the purpose of completing the business for which the meeting is held. Where that is done, the whole period is regarded as being one day, and the meeting or sitting as one meeting. If in such a case the day has been suffered to expire without adjournment, then nothing can be done to keep alive the functions of the body, and their authority necessarily expires. But here there is no need, and no reason, as it seems to me, for the application of the technical sense of the word "adjourn" to the enactments of the statute. The statute says the commissioners shall go to the place, and shall from time to time hold meetings for the purpose of such inquiry. If the clause had ended there, how could it be contended that the commission would have expired if, at the end of the first day, the commissioners had concluded the meeting, and had said nothing about meeting the next day? Their power to sit is created by the statute, and the statute says they are to hold meetings from time to time. It is not the case of a court, such as in the cases referred to, where the authority is kept alive by an act of the court. Here the authority is kept alive by the words of the statute, and it is continued in existence until the inquiry is brought to a termination. If the clause had ended there, I apprehend there could not be any question raised. Then comes the express power to adjourn, and it is upon these words that the argument has turned, "and shall have power to adjourn such meetings from time to time, and from any one place to any other place within such county, &c., or within ten miles thereof, as to them may seem expedient." It must be contended, in order to support

the motion, that the express power to adjourn, as given there, is to be read as a limitation on the power under the former part of the clause, and making, as it were, the continuance of the commissioners' powers conditional upon the formality of the adjournment. It seems to me that to hold that would be to defeat the object of the statute, which was to give power to the commissioners to move from one place to another, which, probably, they would not have had under the previous clause. Probably it was meant to express this: the commissioners shall not be bound to go on from day to day, but they shall have power to postpone it over any given number of days; and then comes the proviso, they shall not adjourn the inquiry over any period exceeding one week without the consent of the Secretary of State. The plain meaning of the whole appears to me to be this, they shall go on from time to time holding meetings, they shall not be bound to hold them de die in diem; they may adjourn as they find it expedient, they may adjourn from one place to another as they find it expedient, provided they do not postpone the inquiry for more than a week without the consent of the Secretary of State. That appears to me to give sense and meaning to the whole of the enactment, and to leave no room for the argument turning upon the technical meaning of the word "adjourn," which has found its way into our language, and is applied frequently in a different sense from its strict meaning.

I agree, therefore, with the rest of the Court, in thinking that the commissioners had power to issue their warrant, and that the prisoner must be remitted to custody.

HANNEN, J. The argument of Sir John Karslake amounts, in point of fact, to this, that the commissioners, in the exercise of their functions, are bound to adjourn in the strict technical sense of that word. I think, however, upon consideration of the sections, it is clear that the word "adjourn" was used in its generally received sense as meaning postponing or suspending. I am led to the conclusion that the Act does not merely authorize the commissioners to meet and adjourn, or to hold meetings to be adjourned from time to time, but to hold fresh meetings from time to time. This appears to me to point to the possibility of one meeting being had on one occasion, and another being had afterwards, as occasion

1869

FITZGERALD'S CASE.

may require, but always subject to the proviso that the inquiry, whether held at several distinct meetings, or at several stages of one meeting, shall not be adjourned over a week without authority of the Secretary of State. But whatever meaning you put on the word "adjourn," I think it must be the act of all the commissioners. But I do not think it need be done in any formal manner. I think all that is requisite is, that the three commissioners shall agree in the doing of it. For instance, they might agree to sit for six consecutive days, and it would not be necessary to adjourn the inquiry at the end of each day. Here the three commissioners had agreed to sit on the 27th of September and the 19th of October. It seems they did not sit on the 27th of September, because all were not present on that day, but they did sit on the 19th of October, as agreed upon between them all; and as that was done with the consent of the Secretary of State, that sitting was rendered as valid as if it had taken place within the period of a week from the last sitting. For these reasons I concur with the other members of the Court.

Prisoner remitted to custody. (1)

Attorney for prisoner: *F. W. Blake.*
Attorney for commissioners: *The Solicitor to the Treasury.*

(1) An application for a habeas corpus was afterwards made to the Court of Exchequer, but that Court came to the same conclusion as the Queen's Bench (see Law Rep. 5 Ex. 25); and the prisoner then consented to be sworn, and was ordered by the commissioners to be released.

COCKER, APPELLANT; CARDWELL AND OTHERS, RESPONDENTS. 1869

Nov. 17.

Nuisances Removal Act, 1855 (18 & 19 *Vict.* c. 121), s. 12—*Nuisances Removal Act*, 1860 (23 & 24 *Vict.* c. 77), s. 13—*The Sanitary Act*, 1866 (29 & 30 *Vict.* c. 90), ss. 14 & 21—*Complaint as to Nuisance by an Inhabitant.*

By 18 & 19 Vict. c. 121, s. 12, the local authority may cause complaint to be made of a nuisance, and the justices may order an abatement of it; by 23 & 24 Vict. c. 77, s. 13, upon complaint before a justice by any inhabitant of any place of the existence of a nuisance in the place, the justice may issue a summons requiring the person by whose act the nuisance arises to appear before two justices, who shall have power to inquire into the complaint, and act with relation thereto as in cases where complaint is made by a local authority under s. 12 of 18 & 19 Vict. c. 121, and as if the person making complaint were such local authority. By 29 & 30 Vict. c. 90, s. 14, part 2 (ss. 14—34) of the Act is to be construed as one with the above statutes; and by s. 21, the nuisance authority shall, previous to taking proceedings before a justice under s. 12 of 18 & 19 Vict. c. 121, serve a notice on the person by whose acts the nuisance arises, to abate the same within a time to be specified in the notice:—

Held, that notice was not necessary before laying a complaint by an inhabitant.

CASE stated by Justices of the West Riding, under 20 & 21 Vict c. 43.

The respondents were summoned on an information laid by the appellant under 23 & 24 Vict. c. 77, s. 13, charging them with a nuisance, by allowing a chimney at their mill, near Dewsbury, to send forth black smoke.

At the hearing it was proved, that the appellant was an inhabitant of the parish or place in which the nuisance complained of arose; a notice had been given (which it was admitted on argument was insufficient), and the justices were of opinion that, upon an information by an inhabitant under 23 & 24 Vict. c. 77, s. 13, a notice was required to be given, as under 29 & 30 Vict. c. 90, s. 14, on an information by the nuisance authority or chief officer of police; and they adjourned the case to give the appellant the opportunity of taking the opinion of the Court on the question, whether a notice was required. (1)

(1) By the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), s. 12, "In any case where a nuisance is so ascertained by the local authority to exist . . . they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the

1869

COCKER v. CARDWELL.

Jelf, for the appellant. On the true construction of these three statutes no notice is necessary previous to a complaint by an inhabitant. By s. 14, part 2 of the last statute is to be construed as one with the other two statutes; and so, construing the three statutes as one, we have s. 12, giving power to the local authority to make complaint of a nuisance, s. 13 giving the same power to an inhabitant, and then s. 21, requiring the local authority and police officer to give notice previous to making the complaint, but omitting all mention of the inhabitant; and the only inference is, that the legislature intentionally omitted the inhabitant, thinking it not necessary, for some reason or other, that he should give a notice.

The respondent did not appear.

COCKBURN, C.J. I am of opinion that the construction contended for by the appellant is right, and that no notice was

person by whose act, default, permission, or sufferance the nuisance arises . . . to appear before two justices in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint;" and they may make an order for the abatement of the nuisance.

By the Nuisances Removal Act, 1860 (23 & 24 Vict. c. 77), s. 13, "Upon complaint before a justice of the peace by any inhabitant of any parish or place of the existence of any nuisance on any private premises in the same parish or place, such justice shall issue a summons requiring the person by whose act, &c., the nuisance arises . . . to appear before two justices in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint, and act in relation thereto as in cases where complaint is made by a local authority under s. 12 of 18 & 19 Vict. c. 121, and as if the person making the complaint were such local authority" . . .

By the Sanitary Act, 1866 (29 & 30 Vict. c. 90), part 2, s. 14: "The expression 'Nuisances Removal Acts' shall mean the Acts 18 & 19 Vict. c. 121 and 23 & 24 Vict. c. 77, as amended by this part of this Act; and this part of this Act [ss. 14—34] shall be construed as one with the said Acts," &c.

By s. 15, "'Nuisance authority' shall mean any authority empowered to execute the Nuisances Removal Acts."

By s. 16, the chief officer of police within the district may, in default of the nuisance authority, under the direction of the Secretary of State, institute any proceeding which the nuisance authority might institute.

By s. 21, "The nuisance authority, or chief officer of police shall, previous to taking proceedings before a justice under s. 12 of the Nuisances Removal Act, 1855, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues . . . to abate the same, and for that purpose to execute such works and to do all such things as may be necessary within a time to be specified in the notice," &c.

necessary. As it seems to me, we have before us one of the most remarkable specimens of legislative incuria of the many which are daily brought before us. The first Act gives power to the local authority to put the law in motion against the person by whose act or default the nuisance is caused; but it makes no provision as to any previous notice. The second Act gives jurisdiction to justices to act in the case of a complaint of a private individual, in the same way as if the local authority had made the complaint. There, also, there is no mention of notice. Then the third Act requires, by s. 21, that before the nuisance authority or chief officer of police shall apply for a summons (omitting all mention of the inhabitant), they shall give notice to the person against whom they intend to take proceedings. Now it is obvious to any one that, if it were proper that a notice should be required before the nuisance authority should act, who are a public body in whom some confidence would be reposed that they would not act without due inquiry, à fortiori a notice would be necessary in the case of a private individual. It would appear that the draftsman of the last Act must have forgotten that in the former Act there was power given, not only to the local authority but to an inhabitant, to initiate proceedings. The construction, however, which must be put upon this piecemeal legislation is clear. If the sections had occurred in the same order in one and the same statute, it clearly could not have been said that the last section applied to a private individual when all mention of him was omitted; and the same construction must apply when the three statutes are to be construed as one.

BLACKBURN, J. I am of the same opinion. I can attach no blame to the justices, nor entertain any surprise, that they have put such a construction on the statutes as they have. The first Act empowers the local authority to take proceedings before justices, the second gives the same power to a private individual, and the justices are to proceed as if the local authority had made the complaint. Then the third Act says that the nuisance authority shall give notice before taking proceedings; and I cannot see why the notice should not be equally necessary in the case of a private individual. I can only suppose that the legislature had forgotten him,

1869

COCKER v. CARDWELL.

and that this is a casus omissus. At all events, we can put but one construction on the statutes, that no notice is necessary on the part of an individual.

MELLOR, J., concurred.

HANNEN, J. I am entirely of the same opinion as to the construction that must be put upon these statutes. I only wish to add, that though this may be but another instance of clumsy and inartificial legislation, yet I do think that reasons may be imagined why the legislature may have intentionally omitted to require a notice in the case of a private person. Other and greater powers are given to the nuisance authority than are given to a private individual. They have, for instance, a right of entry to inspect premises, and it may well be that a public body having such powers should be required to give a previous notice, whereas a private individual knowing of a nuisance may be allowed to proceed without a notice, subject only to the risk of having to pay costs if he unnecessarily put the law in motion.

PER CURIAM. The case must be sent back to the justices, with the intimation of the opinion of the Court, that a notice was not necessary.

Case remitted accordingly.

Attorneys for appellant: *Chester & Urquhart, for T. W. Clough, Huddersfield.*

KENT, APPELLANT; ASTLEY, RESPONDENT. 1869 Nov. 13.

Factory Acts Extension Act, 1867 (30 & 31 *Vict. c.* 103), *s.* 3, *sub-s.* 7—*Factory*—*Slate Quarry.*

A slate quarry, a large open space extending over an area of 400 acres, the works of which are carried on in the open air, the only buildings being sheds, and in which more than fifty persons were employed in splitting the rock into slates and shaping them for sale, is not "a factory" within the meaning of 30 & 31 Vict. c. 103, s. 3, sub-s. 7.

Quære, whether the process is a "manufacturing process" within the meaning of the sub-section.

CASE stated by Justices of Carnarvonshire under 20 & 21 Vict. c. 43.

The appellant, a sub-inspector of factories, laid an information against the respondent, alleging that he had offended against the Factory Act (7 Vict. c. 15), as amended by 13 & 14 Vict. c. 54, 16 & 17 Vict. c. 104, and 30 & 31 Vict. c. 103, for that he, being the occupier of a certain factory within the true intent and meaning of the above Factory Acts, in such factory, in, on, and within the precincts of which factory fifty and more persons were employed in a certain manufacturing process, namely, in altering, repairing, ornamenting, finishing, and otherwise adapting slates and slabs for sale, did unlawfully employ, keep, and allow to remain in the factory a young person requiring a surgical certificate of age, named R. G. Davies, without the certificate of age required by the said Acts.

There was a second complaint that the respondent did unlawfully employ, keep, and allow to remain in the said factory a young person requiring a surgical certificate named R. G. Davies, without having duly registered the name of the said person and the date of his first employment or re-employment, in the form and according to the directions given in Sch. B. of 7 Vict. c. 15.

The slate quarry, of which the respondent is the occupier, is a large open space extending over about 400 acres (in which there are also covered sheds or huts where the splitters work) over which hundreds of men and very young boys are employed in getting large blocks of slate, which blocks or raw material are drawn when got to other parts of the same quarry, and split with hammers and

Followed in Redgrave v. Lee 16 Q.B.D. 363.

1869

KENT v. ASTLEY.

chisels, used as wedges, in laminæ or slates. These laminæ or slates are then edged square with an iron knife, by hand, into separate slates or articles, and divided into quantities for sale. They are sent away in thousands from the quarries to the market. These slates are also sold by retail, either separately or in quantity, by the buyers of them. In these quarries, also, tombstones, gate-posts, chimney-pieces, tanks, and slabs of every size, are made out of these blocks of slate, and ornamented, when need be, according to order.

By 30 & 31 Vict. c. 103, s. 3, factory shall mean . . .

7. "Any premises, whether adjoining or separate, in the same occupation, situate in the same city, town, parish, or place, and constituting one trade establishment, in or within the precincts of which fifty or more persons are employed in any manufacturing process."

And every part of a factory shall be deemed to be a factory except such part (if any) as is used exclusively as a dwelling:

"'Manufacturing process' shall mean any manual labour exercised by way of trade, or for purposes of gain, in or incidental to the making of any article or part of an article, or in or incidental to the altering, repairing, ornamenting, furnishing, or otherwise adapting for sale any article."

It appeared from the evidence that the boy, R. G. Davies, who was fourteen years old, and had not been certified by the examining surgeon, nor registered, was employed in the shaping of slates with an instrument which was used for preparing the slate for sale to cleave and cut the sides; and he worked in a small shed on an open bank, with other boys.

The following evidence was given as to the processes carried on in the quarry:—

O. Parry: I am agent at Dinorwic quarry. Slates and flags are manufactured for sale at the quarry, and the process is, first of all they are blasted out of the rock, then reduced into smaller blocks by pilloring and cross-cutting implements, being hammers and chisels worked solely by the hand. Then they are cleaved and dressed, all done by hand; a thin chisel and mallet for cross-cutting, a longer chisel and mallet for cleaving. They are afterwards dressed with a knife by hand. This operation is done in

small huts about the quarry. They are ready then for the market. Flags for pavements and cisterns are manufactured there. Chimney-pieces are manufactured there, finished by hand. The sawing is done by machinery, worked by steam-power.

Cross-examined: Seven persons are employed in making the chimney-pieces. Only three are employed in any building within the quarry. Thirty-three are employed in making flags and chimney-pieces, several hundreds in working roofing slates.

The justices dismissed the complaints, because they considered that in the quarries there was no possibility of such a thing as a clock being visible, or capable of being heard by all persons employed in the quarry, which the Act appears to contemplate (1), and that scarcely any clause could be applied to quarries. The inside walls of the factory were to be limewashed (2), but that would be difficult and absurd as to a quarry. Then the definition of a factory was not applicable to a quarry, being described as a place wherein machinery was used in manufacturing hemp, flax, and such-like materials; and the justices could not bring themselves to believe that the legislature ever contemplated that quarries should be included under the Factory Acts.

The question for the Court was, are the quarry and premises before described within the operation of the Factory Acts.

Sir J. D. Coleridge, S. G. (*Archibald* with him), for the appellant. Although the quarry extended over 400 acres, yet that portion of it within which the boy was employed was a factory within the meaning of the Factory Acts. In *Palmer's Shipbuilding and Iron Co.* v. *Chaytor* (3) it was held that one of the separate departments of a business was a factory within 30 & 31 Vict. c. 103, s. 3, sub-s. 5. Under sub-s. 7 a place is not the less a factory because it is scattered over a large area; the premises need not adjoin; if there are separate departments, they may come within the definition; here more than fifty persons are

(1) 7 Vict. c. 15, s. 26, requires the hours of work of children and young persons to be regulated by a public clock, or some other clock open to public view. The Court, however, took no notice of this point.

(2) 30 & 31 Vict. c. 103, sched. s. 9, enacts that "s. 18 of 'The Factory Act, 1844' (7 Vict. c. 15), relating to limewashing and washing of factories, shall not be in force as respects any factory."

(3) Law Rep. 4 Q. B. 209.

1869

KENT v. ASTLEY.

employed in sheds in making roofing slates, which are squared by manual labour and adapted for sale for gain.

[HANNEN, J. Is it a trade establishment? In *Sutton* v. *Weeley* (1) it was held, that the owner of a brickfield who converted the soil into brick could not be considered a trader; Lord Ellenborough says, "In the present case Weeley, by devise, took a freehold interest in the brick earth, and can in no way be considered as buying anything which he sold again; but, like a burner of his own chalk or rock into lime, the smelter from his own mines of iron or lead ore into pigs, or the manufacturer of his own rock into alum, appears to have merely carried his own soil to market, in some way manufactured." What does the owner of the quarry do beyond enjoying his estate in the most beneficial way?]

The object of the Factory Acts is the protection of young persons; and trade establishments, under sub-s. 7, ought not to receive the limited construction which "trader" has received under the Bankruptcy Acts. To make a man a trader under the Bankruptcy Acts there must be a buying and selling; but the object of the Factory Acts is beside the question of trade, and paramount to the rights of a father over his children. The last Act is intended to extend the provisions of the former Factory Acts, and where the mischief intended to be remedied by those Acts exists it ought to be applied. The exemptions from the Act are contained in s. 5, and quarries are not mentioned amongst them.

Milward, Q.C. (*Hance* with him), for the respondent. The word "premises" in s. 3, sub-s. 7, is to be construed as ejusdem generis with the same word in the 5th and 6th subsections. It cannot mean a quarry extending over several hundred acres, but it must mean an establishment where the manufacture is carried on in a building, and not in the open air, or under sheds. The provisions of the Factories Acts cannot be applied to open air employment.

Sir J. D. Coleridge, S. G., in reply.

COCKBURN, C.J. I am of opinion that the decision of the magistrates must be affirmed; but I do not agree with the reasons assigned by them. I think the business in which the boy was

(1) 7 East, 442, 446.

employed was a manufacturing process; the soil gained from the quarry was converted into slates by manual labour for the purposes of trade. The slates, when finished, are manufactured articles. I quite agree that if the proprietor of a quarry converts its soil into some manufactured article, it must be taken that he is a manufacturer quoad that article; it is as if a farmer grew flax, and having a ropewalk on his farm, converted it into rope. Therefore, if this work had been carried on within a building, I think that it would have fallen within the scope of the statute, and that the justices ought to have convicted. I take it to be customary that the soil should be converted into slates either in the quarry itself, or in a place immediately adjoining it, and I do not think that in using the word "premises" the legislature intended to include sheds erected in the quarry merely as a protection against the weather; they are only accessories to the quarry and the quarrying processes; and the legislature has not as yet declared that open air works shall be within the scope of the Factory Acts. No doubt the object of the legislature was to prevent the crowding together of workmen, and their detention at labour for an undue time, and the mingling of the sexes. By degrees the legislature has extended the operation of the Acts to manufactures not originally within their scope. But, except in cases which have been specially provided for, it has not as yet included works carried on in the open air, because they are less exposed to the evils incident to manufactures carried on in buildings. Where the mischief is the same the remedy ought to be applied, but we ought not to outstrip the legislature, and apply these statutes to circumstances to which the legislature appears to have considered that they could not be properly applied. I cannot think it was intended that where a process like this is carried on in the immediate proximity to a quarry, it is to be included in statutes meant to apply to manufactures carried on in buildings. It has been argued that the facts of the present case fall within the mischief contemplated by the legislature. They may embrace some, but they do not embrace all, of the evils which the legislature intended to remedy. Here the sexes are not mingled together; women, girls, and very young children are not employed. It is true that facilities ought to be afforded for the education of children, but

1869

KENT v. ASTLEY.

children employed in agriculture, as well as those employed in quarries, are deprived of this advantage. The legislature may hereafter interfere, but it is not for us to introduce into Acts of Parliament provisions which do not seem to us to be included in them. Looking at the circumstances of the case, I find that the process of manufacturing slates was practically carried on in the open air within the boundaries of the quarry, and that the evils of crowding and mingling of the sexes do not occur, and therefore I think we shall be straining the statute if we decided that the word "premises" is applicable to this quarry.

MELLOR, J. I am of the same opinion. The legislature has from time to time extended the Factory Acts to different trades and businesses. Numerous slate quarries exist, and a large number of persons are employed in them: if the legislature intended to apply the Factory Acts to them, it would have been done by special enactment. Looking at the former part of the section, I am of opinion that "premises" do not include quarries.

HANNEN, J. I am of the same opinion. I concur as to the expediency that persons employed as this boy was employed should be subjected to some such regulations as these contained in the Factory Acts, but I do not think that the legislature intended that a boy employed in a quarry should be subject to these particular regulations. I agree with my Brother Mellor, that if the legislature had intended to apply the Factory Acts to quarries, they would have been expressly mentioned, and this omission leads strongly to the conclusion that it was not intended to interfere with persons employed in quarries. I agree with my Lord and my Brother Mellor, that the word "premises" cannot be taken to include a place like this, spreading over an area of four hundred acres. I think it right however to add, that I am inclined to decide this case on somewhat narrower grounds. The word "premises" must be construed as premises constituting a trade establishment, and, by analogy to the bankrupt law, these premises do not form an establishment in which a trade is carried on. It is well settled that when a person uses the produce of his own land for its ordinary purpose, he does not thereby carry on a trade; that is clearly

1869

KENT v. ASTLEY.

expressed in the passage I have read during the argument, and I will read another passage from *Wells* v. *Parker* (1), in which Lord Mansfield lays down the same doctrine: "From the authorities that have been cited, and the reason of the thing, I take the true distinction to be this. If a man exercise a manufacture from the produce of his own land as a necessary or usual mode of reaping or enjoying that produce, and bringing it advantageously to market, he shall not be considered as a trader, though he buy the necessary ingredients and materials to fit it for market; as in the case of a farmer who makes cheese on his own land, and who buys rennet and salt; or as in a case mentioned at the bar, where a man makes his own apples into cider, though there be an expense attending the operation, and though many things are to be bought, and some mixture, yet he is no trader; for it is the usual mode of enjoying land in the cider counties. So in the alum works, as determined, where the operation was proved to be the necessary and constant mode practised by the proprietors of alum works. Or like the case of the coal mines, where raising them out of the pit is as necessary to the enjoyment of the land as threshing corn, &c." Then the Chief Justice states a qualification. "But where the produce of the land is merely the raw material of a manufacture and used as such, and not according to the usual mode of enjoying the land; in short, where the produce of the land is an insignificant article in comparison of the whole expense of the manufacture, there he ought to be considered as a trader." If we apply that to the present case, in which the proprietor of a quarry is prepared to convert the produce into slates, can he be said to be carrying on a trade establishment on his land? I think not, because the most obvious use of the produce is to split the raw material into laminæ, and whilst the owner confines himself to this, I think he does not carry on a trade; and it is to be observed that it is only in this process that more than fifty persons are employed.

Judgment for the respondent.

Attorney for appellant: *The Solicitor to the Treasury.*

Attorney for respondent: *Fluker, for Dewes & Burgess, Nuneaton.*

(1) 1 T. R. at p. 38.

1869
Nov. 17.

MERCER, APPELLANT; WOODGATE, RESPONDENT.

Highway—Limited Dedication—Right of Owner of Soil to Plough up Footpath.

11 C.L.D 335

There may, in law, be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, and destroy all trace of it for the time.

As far as living memory went, the occupier for the time being of a field over which a footpath crossed had been in the habit, in due course of farming, of ploughing up the whole field, and so destroying the footpath. There was no evidence of the existence of the footpath before living memory:—

Held, that the inference to be drawn was, that the owner had originally dedicated the right of way to the public, subject to this right of periodically ploughing it up.

Followed in Arnold v Blaker 6 Q.B. 433,

CASE stated by Justices of Worcestershire under 20 & 21 Vict. c. 43.

Upon the hearing of an information preferred by the respondent against the appellant under 5 & 6 Wm. 4, c. 50, s. 72, for unlawfully and wilfully destroying and injuring the surface of a certain highway by ploughing up the same, the following facts were admitted or proved:—

The appellant is the occupier of a field of arable land in the parish of Bellbroughton, across which is a public footpath leading from the village of Bellbroughton to the Stourbridge and Bromsgrove turnpike road and the hamlet of Fairfield; and in September, 1868, in due course of farming, he ploughed the field and ploughed up and destroyed all trace of the footpath.

The appellant bonâ fide claimed the right to plough and to continue to plough the footpath, and the previous occupier of the field had so ploughed at all times within living memory.

There was no evidence before the justices either of the existence of the footpath or tillage of the field before living memory; and no witnesses were called on behalf of the appellant, nor was any evidence given of any partial or limited dedication of the land, or of any reservation of the right to plough up the land along the line of footpath, except as otherwise appears by the case.

On the part of the respondent it was contended that the footpath was a highway within the meaning of 5 & 6 Wm. 4, c. 50, and that under the circumstances the justices ought to convict the appel-

lant under s. 72 for the destroying and injuring the surface of a highway.

On the part of the appellant it was contended that the footpath was not a highway within the meaning of the statute, but that if it were, he and the previous occupiers having ploughed it up as long as it was known to have existed, the public had a right only to the use of the footpath subject to its being so ploughed up.

The justices were of opinion that the footpath was a highway within the meaning of the statute, and that the appellant, having destroyed and injured the surface of the footpath, they were bound in law to find the appellant's acts to be unlawful, no further evidence having been offered of any reservation by the owner, at the time of dedication or presumed dedication, of a right to plough up the surface of the footway; and accordingly they convicted the appellant.

The question for the opinion of the Court was, whether the footpath is a highway within 5 & 6 Wm. 4, c. 50; and if so, whether the justices were bound in law to convict the appellant of an unlawful act, or whether the justices would have been justified in finding the acts complained of to be lawful; and whether they had jurisdiction.

If the Court should be of opinion that the justices were bound to convict the appellant, and that their jurisdiction was not ousted in consequence of the land having been ploughed at all times when necessary within living memory, the conviction was to be affirmed; otherwise it was to be quashed.

Harington, for the appellant. The only evidence in this case is that as long as the footpath has existed the occupier for the time being has been in the habit of ploughing it up, and the only inference that can be drawn is, that the highway was originally dedicated with a reservation of the right of the owner to plough over it when he ploughs the rest of his soil. Thus, in *Pelham* v. *Pickersgill* (1), where the liberty of passage over the soil and a toll for such passage were both shewn to be immemorial, it was held that it must be presumed that the original grant was subject to the reservation of a toll. It is clear law that there can be a

(1) 1 T. R. 660.

1869

MERCER v. WOODGATE.

qualified or limited dedication of a highway. *Stafford* v. *Coyney* (1) and *Fisher* v. *Prowse* (2) are direct authorities for that proposition.

Rew, for the respondent, was then called upon. The cases cited are quite distinguishable from the present. In those cases the highway was dedicated subject to a partial permanent obstruction, but such that the highway could still be used. Here there is a total destruction of the highway for the time, which is inconsistent with the dedication of a highway, and amounts to an illegal nuisance. In *James* v. *Hayward* (3) the rest of the Court held the erection of a gate across a road was a nuisance, which no doubt is good law. Croke, J., however says: "But it seemed to me that it is not any nuisance in itself, being so small a trouble, but much for the public good that there should be inclosures for the preservation of corn and grass from cattle straying. And the law accounts not such petty troubles as nuisances; for it appears that there are many gates in divers highways which have been always allowed; and if it were a nuisance in itself there should not be any gate, for there cannot be any prescription for a nuisance." In *Reg.* v. *Charlesworth* (4), which was an indictment for nuisance in a highway by cutting it up with tramways, Lord Campbell, C.J., says: "It is argued that a right has been reserved by the landowner to make as many rail and tram roads as he pleases in all time to come, for the convenient use of his coal pits. But if this would be a nuisance, there could be no such right reserved. No authority has been cited for the reservation of a right in future to put up as many gates or make as many tramways as the landowner thinks proper. No such reservation could exist, if the acts would be a nuisance."

[BLACKBURN, J. Patteson, J., is much more cautious; he only says: "We cannot suppose a reservation of right so large as that claimed."]

In *Bateman* v. *Burge* (5), Park, J., held, that a stile or gat across a footpath could not be raised.

[COCKBURN, C.J. No one is obliged to dedicate a highway, and

(1) 7 B. & C. 257.
(2) 2 B. & S. 770; 31 L. J. (Q.B.) 212.
(3) Cro. Car. 184.
(4) 16 Q. B. 1012, 1020.
(5) 6 C. & P. 391.

if the public take it they must take it subject to any condition the owner imposes.]

Ploughing up is a destruction of the thing granted, and is thus inconsistent with the grant. In Wellbeloved on Highways, p. 443, it is said, "It may also be stated as clearly deducible from Lord Ellenborough's decision in the case of *Rex* v. *Cross* (1), that it is a common nuisance to plough up a public footpath; not only because the public are obstructed in their accustomed passage, but more particularly as all traces of the way are thereby obliterated, and the public are left in ignorance as to the route which they ought to pursue. This is a point of law seldom attended to, and yet very frequently violated; but there can be no doubt, that any occupant who thus infringes the public rights subjects himself to an indictment. In one case (*Griesley's Case*) (2), where an information was laid against the defendant for stopping up the highway, the word was *obstupabat;* it was proved in evidence that he *ploughed it up,* and the Court resolved that it did well maintain the information."

[BLACKBURN, J., in the notes to *Dovaston* v. *Payne* (3), a case (4) is cited as shewing that you may dedicate a way subject to the pre-existing right of the adjoining occupiers to obstruct it by placing their goods on it.]

That is only a partial obstruction; here is a total destruction. But all that was decided in *Morant* v. *Chamberlin* (5) was that the Court could not draw the inference from the facts that the right of the occupiers had existed before or from the time of the dedication of the way; and the Court only expressed an inclination of opinion that there might be such a partial dedication.

[BLACKBURN, J. If there cannot be such a qualified dedication, then there is no evidence of any dedication at all. But it is quite possible for any one to walk across a field immediately after it is ploughed up.

COCKBURN, C.J. Suppose a swing-bridge dedicated to the public, but to be opened at times when it is necessary to let in the

(1) 3 Camp. 224.
(2) 1 Vent. 4.
(3) 2 Sm. L. C. at p. 142, 6th ed.
(4) *Morant* v. *Chamberlin*, 6 H. & N. 541; 30 L. J. (Ex.) 299.
(5) 6 H. & N. 541, 564; 30 L. J. Ex.) 299, 310.

1869

MERCER v. WOODGATE.

ships of the person dedicating: surely, that can be done. What is that but the present case? In *Rex* v. *Northampton* (1), it was held that there could be a valid partial dedication of a bridge to the public, to be used at such times only as the ford across the river was dangerous.]

COCKBURN, C.J. I am of opinion that this conviction was wrong. There is no doubt that as far as living memory goes back, while on the one hand, the public has enjoyed this right of way, on the other hand the owner or occupier of the field during the same period has from time to time ploughed up the whole of his field without any regard to the particular track over which the footpath passes. The only proper inference to be drawn is, that the exercise of this right of the owner has been coeval with the exercise of the right of way of the public, and again the proper inference from that is, that the right of the public was granted, or the original dedication of the way was made, subject to this right in the owner periodically to plough up the soil. It must not be lost sight of that there is no obligation upon the owner to dedicate a right of way, nor, on the other hand, is there any obligation on the part of the public to accept the dedication; and therefore, if the owner in the present case has said to the public, you may come across my field as a convenient way, but it must only be subject to my right to plough across it at proper times, and if the public have chosen to accept the dedication on those terms, there is no injustice towards them to hold them bound by the terms; on the contrary, there would be great injustice and hardship to hold there had been an absolute dedication where the owner had clearly only intended a limited dedication. *Rex* v. *Northampton* (1) is a direct authority that there may be in law such a partial dedication; and if there could not, then, as my Brother Blackburn has pointed out, the appellant is in this dilemma, that there is no dedication and no highway at all. Not only would there be injustice in holding otherwise, but it would be productive of mischief to say that such a state of things as shewn in this case could not exist; every one knows instances of footpaths ploughed up as the time comes round for ploughing fields; and if the public or parish could insist on

(1) 2 M. & S. 262.

converting such paths into gravelled ways, the owners would be chary in allowing any accommodation to the public over their land. I am clearly of opinion that there may be, in law, a partial dedication like that contended for by the appellant in the present case; but if not, then there is no dedication at all shewn, and the conviction would be equally wrong.

BLACKBURN, J. I am of the same opinion. I quite agree that when a highway has been dedicated to the public (which as the Lord Chief Justice has said is a purely voluntary act on the part of the owner), anything afterwards done by the owner interfering with that right of way would be a nuisance; and that ploughing up the pathway would be such an interference; and when a highway is dedicated, and the dedication accepted, not only is there a right in the public, but an obligation on the part of the parish to repair. But in the present case, in whatever way the owner may be taken to have given this right of way over his field, the inference from the evidence is, that he did not dedicate it simpliciter as a highway, but he dedicated it subject to the right of ploughing it up periodically; and if this right is inconsistent with a grant of a right of way to the public, then there was no dedication at all, and the present owner has a right to stop up the pathway altogether, and so prevent the parish from repairing the path in such a way as to interfere with his ploughing. But I can see no objection, in law, to such a partial dedication. The principle applicable to such cases is enunciated in the judgment of the Court in *Fisher* v. *Prowse* (1), very much in the same language as my Lord has used to day: "It is, of course, not obligatory on the owner of land to dedicate the use of it as a highway to the public. It is equally clear that it is not compulsory on the public to accept the use of a way when offered to them. If the use of the soil as a way is offered by the owner to the public under given conditions and subject to certain reservations, and the public accept the use under such circumstances, there can be no injustice in holding them to the terms on which the benefit was conferred. On the other hand, great injustice and hardship would often arise if, when a public right of way has been acquired under a given state of circum-

(1) 2 B. & S. at p. 780; 31 L. J. (Q.B.) at p. 218.

1869

MERCER v. WOOLGATE.

stances, the owner of the soil should be held bound to alter the state of circumstances to his own disadvantage and loss, and to make further concessions to the public altogether beyond the scope of his original intention."

MELLOR, J. I am of the same opinion. The owner might have dedicated this pathway, in express terms, with a condition attached of ploughing it periodically; and we all know many such paths which the occupiers are constantly in the habit of ploughing up from time to time. Can we do otherwise than infer from the evidence in the present case that this was the limit and condition on which the owner dedicated this footpath? Mr. Rew said that the owner could not dedicate a highway subject to a nuisance, but in all the cases in which such a partial dedication has been sustained the act must have been a nuisance or the question could not have arisen.

HANNEN, J. The authorities cited for the respondent go to this extent only, that where there has been an unrestricted dedication of a right of way, ploughing it up, though in due course of husbandry, would be a nuisance. *Fisher* v. *Prowse* (1) is undistinguishable in principle, and is a distinct authority that there may exist in law a highway subject to be interrupted at certain times when the convenience of the owner of the soil requires it. If this were not the law, the effect would be that all these ways over which the owner has always been used to plough would be stopped up, because in such a case there would be no dedication at all, as is pointed out by Parke, B., in *Poole* v. *Huskinson* (2), "There may be a dedication to the public for a limited purpose, as for a footway, horseway, or driftway; but there cannot be a dedication to a limited part of the public. In that respect the direction of the learned judge was quite correct; not so the alternative, that as such a partial dedication was invalid in law, it would nevertheless operate against the intention of the owner of the soil, in favour of the whole public. I think it would be merely void. In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, an

(1) 2 B. & S. 770; 31 L. J. (Q.B.) 212. (2) 11 M. & W. at p. 830.

animus dedicandi, of which the user by the public is *evidence*, and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." It follows that the evidence in the present case shews a partial dedication only, and that either the right of the public is subject to the reservation or there is no dedication at all; in either case, the appellant was wrongly convicted.

Conviction quashed.

Attorneys for appellant: *Wood, Street, & Hayter.*

Attorneys for respondent: *Skilbeck & Griffith, for Harward, Shepherd, & Harward, Stourbridge.*

THE QUEEN *v.* THE JUSTICES OF THE WEST RIDING. DRAKE'S CASE.

Nov. 25.

Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *ss.* 7, 8—*Notice of Application for Certificate of Justices—Prior Application—Res judicata.*

By 9 Geo. 4, c. 61, s. 1, justices in every county, &c., are to hold a general annual licensing meeting between the 20th of August and the 14th of September; and, by s. 3, they are required to continue such meeting by adjournment to such days (during August and September) and places as they may deem most convenient for enabling persons to apply for a licence. By 32 & 33 Vict. c. 27, s. 4, no licence is to be granted without a certificate of justices. By s. 5 certificates are to be granted by the justices at the general annual licensing meeting held in pursuance of 9 Geo. 4, c. 61, or at some adjournment of such meeting. By s. 7 every person intending to apply for a certificate shall, twenty-one days before he applies, give notice in writing of his intention, as in the section prescribed:—

Held, that the notice might be given twenty-one days before, and the application made at, an adjourned meeting.

At a general annual licensing meeting B. applied for a certificate for a certain house. It was proved that he had been convicted of misconduct in another house. The justices refused the certificate. At an adjourned meeting D. applied for a certificate for the first house:—

Held, that the fact of the certificate having been refused to B. was no bar under s. 8 to the application by D.

RULE, calling on the Justices of the West Riding of the county of York, to shew cause why a mandamus should not issue commanding them to enter continuances and hear the appeal of Thomas Drake against the decision of the justices at the adjourned

1869

DRAKE'S CASE.

general licensing meeting holden on the 17th of September, 1869, for the borough of Halifax, refusing the application of Drake for a certificate under the provisions of the Wine and Beer-house Act, 1869 (32 & 33 Vict. c. 27).

It appeared, from the affidavits, that on the 1st of May, 1869, a license, granted to Joseph Boocock under the Acts relating to the sale of beer and cider by retail, was in force for the sale by retail of beer in the Nag's Head Inn, in Halifax, to be consumed on the premises, and continued in force up to the 20th of August, 1869. On the 25th of June the justices, at a meeting, appointed the 20th of August for holding the general annual licensing meeting for the borough, of which due notice was given. On the 22nd of July Boocock gave a notice of his intention to apply, at the general annual licensing meeting, for a certificate to obtain a license to sell beer at the Nag's Head Inn. On the 20th of August Boocock appeared before the magistrates, and it was proved that in December, 1864, when occupying the West Riding Hotel, he was fined 5*l.* for knowingly permitting prostitutes to assemble in his house. And in August, 1865, the spirit licence for the West Riding Hotel was refused. The justices, therefore, refused the certificate, on the ground that s. 8, subs. 3, of the Wine and Beer-house Act, 1869 (32 & 33 Vict. c. 27) applied. Boocock did not appeal against this decision. At this meeting the justices adjourned such meeting to the 17th of September, 1869, of which due notice was given.

On the 25th of August, Thomas Drake gave notice, stating that he was the occupier of the Nag's Head, and that he intended to apply, at the adjourned sessions to be holden on the 17th of September, for a certificate to enable him to sell beer, copies of which notice were served on the constables and the overseers of the township, and were also posted on the church doors. On the 17th of September Drake attended before the justices, who refused to hear the application of any person whose certificate had been refused on the 20th of August, or any application in respect of any premises respecting which the certificate had been refused. Drake had not applied for a certificate on the 20th of August, nor had a certificate been ever refused on account of the Nag's Head being a house of a disorderly character, or for any other reason.

Drake gave due notice of appeal to the quarter sessions held for the West Riding of the county of York, and on the 19th of October the appeal was heard, when it was admitted that the notices of the 25th of August had been served and posted in the manner required by the Wine and Beerhouse Act, 1869, s. 7, but it was objected that they were too late, and ought to have been given in the month of July, and ought to have expired before the 20th of August, and that any notice given of an intention to apply at the adjourned annual licensing meeting for a certificate under the Wine and Beerhouse Act, 1869, must be given twenty-one days before the day appointed for the general annual licensing meeting: for that the general annual licensing meeting and the adjourned annual licensing meeting were, in law, but one day.

The justices decided that the notices of the 25th of August were too late, and dismissed the appeal with costs. (1)

(1) 9 Geo. 4, c. 61, s. 1:—"In every division of every county and riding, and of every division of the county of Lincoln, and in every hundred of every county, not being within any such division, and in every liberty, division of every liberty, county of a city, county of a town, city, and town corporate, in that part of the United Kingdom called England, there shall be annually holden a special session of the justices of the peace (to be called the General Annual Licensing Meeting), for the purpose of granting licences to persons keeping or being about to keep inns, alehouses, and victualling houses, to sell exciseable liquors by retail, to be drunk or consumed on the premises therein specified; and that such meetings shall be holden in the counties of Middlesex and Surrey within the first ten days of the month of March, and in every other county on some day between the twentieth day of August and the fourteenth of September inclusive; and that it shall be lawful for the justices acting in and for such county or place assembled at such meeting, or at any adjournment thereof, and not as hereinafter disqualified from acting, to grant licences, for the purposes aforesaid, to such persons as they, the said justices, shall, in the execution of the powers herein contained, and in the exercise of their discretion, deem fit and proper."

s. 3:—"It shall be lawful for the justices acting at the general annual licensing meeting, and they are hereby required, to continue such meeting by adjournment to such day or days, and to such place or places within the division or place for which such meeting shall be holden, as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place to apply for such licence: Provided nevertheless, that the adjourned meeting to be holden next after such general annual licensing meeting shall not be so holden in or upon any of the five days next ensuing that on which such general annual licensing meeting shall have been holden as aforesaid; and that every adjournment of the said general annual licensing meeting shall be holden with-

1869

DRAKE'S CASE.

Waddy shewed cause. The question is, whether an application for a certificate under the Wine and Beerhouse Act, 1869, can, in the first instance, be made to the adjourned sessions. Under s. 1

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in the month of March in the counties of Middlesex and Surrey, and of August or September in every other county."

32 & 33 Vict. c. 27, s. 4:—"From and after the fifteenth of July, 1869, no licence or renewal of a licence for the sale by retail of beer, cider, or wine, or any of such articles, under the provisions of any of the said recited Acts, shall (save as in this Act otherwise provided) be granted except upon the production and in pursuance of the authority of a certificate granted under this Act. Any licence granted or renewed in contravention of this enactment shall be void."

s. 5:—"Certificates under this Act shall be granted by the justices assembled at the general annual licensing meeting held in pursuance of 9 Geo. 4, c. 61, or at some adjournment of such meeting held in pursuance of the said last-mentioned Act" . . .

s. 7:—"Every person intending to apply to the justices for a certificate under this Act shall, twenty-one days at least before he applies, give notice in writing of his intention to one of the overseers of the parish, township, or place in which the house or shop in respect of which his application is to be made is situate, and to some constable or peace officer acting within such parish, township, or place, and shall in such notice set forth his name and address, and a description of the license or licenses for which he intends to apply, and of the situation of the house or shop in respect of which the application is to be made; and in the case of a house or shop not theretofore licensed for the sale by retail of beer, cider, or wine, such person shall also within the space of twenty-eight days before such application is made cause a like notice to be affixed and maintained between the hours of ten in the morning and five in the afternoon of two consecutive Sundays on the door of such house or shop, and on the principal door or one of the doors of the church or chapel of the parish or place in which such house or shop is situate, or if there be no such church or chapel on some other public and conspicuous place within such parish or place. Where application is made to the justices for the grant of a certificate under this Act by way of renewal only, notice in pursuance of this section shall not be requisite.

s. 8. All the provisions of the said Act (9 Geo. 4, c. 61) as to the terms upon which, and the manner in which, and the persons by whom, grants of licences are to be made by the justices at the said general annual licensing meeting, and as to appeal from any act of any justice shall, so far as may be, have effect with regard to grants of certificates under this Act, subject to this qualification, that no application for a certificate under this Act in respect of a licence to sell by retail beer, cider, or wine not to be consumed on the premises, shall be refused, except upon one or more of the following grounds; viz.:—

1. That the applicant has failed to produce satisfactory evidence of good character.

2. That the house or shop in respect of which a licence is sought, or any adjacent house or shop owned or occupied by the person applying for a licence, is of a disorderly character, or frequented

of 9 Geo. 4, c. 61, the general annual licensing meeting must be held on some day between the 20th of August and the 14th of September; and, by s. 3, an adjourned meeting may be held on such day and at such places as the justices may deem most convenient. The general meeting and the adjourned meeting are in law one day, and the purpose of the adjourned meeting was merely to finish the business begun at the general meeting. Under s. 10 the notices of intention to apply for a licence must be given before the last day of July; hence the Act contemplates that the notices must be given in time for the general meeting, and therefore that the application must be made at that meeting. That section is not repealed, and s. 7 of the Act of 1869 must be construed with reference to it.

Secondly. The justices, in refusing Boocock's application, have decided that no certificate ought to be granted for the Nag's Head. The matter is res judicata.

Hannay, in support of rule. With regard to the matter being res judicata, Boocock's licence was refused on grounds personal to himself, and with reference to an offence committed in another house. The applicant has brought himself within s. 7 of the Wine and Beerhouse Act, 1869, and that is all he need do to be entitled to a certificate. From s. 3 of 9 Geo. 4, c. 61, it is clear that an original application may be made at the adjourned meeting; the words of the section are express. Section 7 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), enacts that notice shall be given twenty-one days "before he applies," that must mean either before the general annual licensing meeting or before the adjourned meeting. If the legislature had intended that the application should be made twenty-one days before the general annual licensing meeting, it would have said so in express terms. The doctrine that a meeting of justices and its adjournment, are to be taken as being held on one day does not apply. It

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by thieves, prostitutes, or persons of bad character.

3. That the applicant having previously held a licence for the sale of wine, spirits, beer, or cider, the same has been forfeited for his misconduct, or that he has through misconduct been at any time previously adjudged disqualified from receiving any such licences, or from selling any of the said articles" . . .

1869

DRAKE'S CASE.

is clear that a special jurisdiction is conferred, which is to be exercised on two different days, and the meetings are quite independent of each other.

BLACKBURN, J. I am of opinion that this rule must be made absolute. The 9 Geo. 4, c. 61, s. 1, provides that a meeting shall be held by justices of the peace on some day between the 20th of August and the 14th of September, but section 3 is that on which our decision must turn; it provides for the adjournment to such day and such places as such justices may deem most convenient and sufficient for enabling persons keeping inns within such division or place, to apply for such licence. The decision of the sessions is not consistent with the construction which must be put on this section. The justices may be acting for a division extending over several miles, and it would be very inconvenient if the justices were to compel an innkeeper living at the northern end of a division to apply to them when sitting near the southern end, and, consequently, the statute provides that he may wait until an adjourned meeting shall be held at a place nearer to him; for this reason, I think it was intended that the innkeeper should apply for a licence at the adjourned meeting, if that were held at a time and place more convenient to him. We have now to construe for the first time, the Wine and Beerhouse Act, 1869, which provides that every person intending to apply, shall twenty-one days at least, before he aplies, give notice in writing. I quite agree with what has been urged on behalf of the applicant, that if the legislature had intended the twenty-one days to refer to a period before the general annual licensing meeting only, and not to a period before the adjourned licensing meeting, nothing would have been easier than to say so; but under s. 5, certificates may be granted at the adjourned meeting, and no doubt, application may be made for them at it; therefore, by the words of s. 7, twenty-one days notice before the adjourned meeting will be sufficient. And when we look at s. 3 of 9 Geo. 4, c. 61, by which the later Act must be construed, we find that the adjourned meeting is to be held for enabling persons to apply for such licence, and therefore by this statute, the notice may be given twenty-one days (in this case it was given twenty-four days) before the adjourned meeting at

1869

DRAKE'S CASE.

which the application is to be made. By this construction, no hardship or inconvenience would be occasioned to any one, and it follows that the notice was in time, and that the quarter sessions were bound to hear the appeal.

But a second objection was made that, as the application by Boocock for a certificate had been refused, and that refusal had not been appealed against, the fact that the "Nag's Head, ought not to be licensed had been finally decided, and had become res judicata: but this was a matter personal to Boocock, and does not affect the application which is in respect of the house; the doctrine as to res judicata therefore has no force.

The merits of the case are for the sessions to decide, but they are bound to hear it, and the rule must be made absolute.

MELLOR, J. I am of the same opinion. Section 5 provides that certificates shall be granted at the general annual licensing meeting, held in pursuance of 9 Geo. 4, c. 61, or at some adjournment of such meeting. The reference to this statute makes the matter very plain. On considering the reasons why an adjournment is allowed, it is clear that it is not like an ordinary adjournment of a court of quarter sessions, which operates only upon the disposal of the business actually before the court at the time, but that it is intended that fresh application may be made at the adjournment. The applicant, in the present case, has given twenty-one days notice of an intention to apply before the adjourned meeting was held, and he has fulfilled the only condition as to notices which the statute has imposed upon him. I agree with my brother Blackburn, that the decision at the general meeting does not act as res judicata, and is of no validity against the present application. The matter is altogether different.

LUSH, J. I am of the same opinion. I wish to add, with respect to the second objection, that if the justices' decision at the general annual licensing meeting had turned upon the bad character of the house, as at present advised, I should have thought that they could not be required to determine the matter a second time. But their decision did not pass upon that ground; it

1869

DRAKE'S CASE.

turned upon the personal qualifications of Boocock. The application by Drake, for a certificate, is totally different from that by Boocock.

Rule absolute.

Attorneys for prosecution: *Bowen & Cotton.*
Attorneys for defendants: *Edwards, Layton, & Jaques.*

Nov. 26.

[IN THE EXCHEQUER CHAMBER.]

SADLER *v.* SMITH.

Arbitrator, decision of, when final—Boat race—Jurisdiction of Referee—Action to recover deposit.

The plaintiff deposited a stake with the defendant with a view to a race between the plaintiff and K., upon the terms "that the race was to be a right-away sculler's race, and the decision of the referee to be final." In such races, the start is made by the men themselves, but if they fail to start through default of either or both, the referee has power to interfere. There was a default in the start, and the referee, who was stationed at some distance from the starting-post, ordered that K. should inform the plaintiff that if he did not start K. was to row over the course without him. K. rowed over the course without having communicated this order to the plaintiff or given him any opportunity of starting, and the referee without enquiry or communication with the plaintiff, ordered the stakes to be paid to K. An action having been brought by the plaintiff to recover his deposit:—

Held (affirming the judgment of the Court of Queen's Bench) that, as the order of the referee was conditional upon its being communicated to the plaintiff, the order not having been communicated, there never was such a start or race as was contemplated; the referee's jurisdiction to award the stakes, therefore, did not attach, and his decision was not final, and the plaintiff was entitled to recover.

APPEAL from the decision of the Court of Queen's Bench discharging a rule to enter a verdict for the defendant.

The declaration was for money received by the defendant for the use of the plaintiff, and for money due upon accounts stated.

Pleas: 1. Never indebted. 2. As to the claim for money received, that the plaintiff and one Kelley entered into an agreement as follows:—"Articles of agreement" between Kelley, on the one part, and the plaintiff on the other part. "They hereby agree to row a right-away sculler's race from Putney to Mortlake; the start to

1869

SADLER v. SMITH.

take place between the aqueduct and the steamboat pier, on Wednesday, the 27th of November, for the sum of 300*l.* a side; the start to take place at half-past 2 P.M., ... to row according to the recognized rules of boat racing. The referee to be chosen at the last deposit, whose decision shall be final. . . . . Either party failing to comply with these conditions to forfeit all money down." That the defendant received the money upon the terms mentioned in the agreement as stakeholder, to pay it to the winner of the race according to the decision of the referee; that the referee was, in accordance with the terms of the agreement chosen; and that the referee decided that Kelley was the winner of the race. Averment of all times and conditions, &c., necessary to entitle Kelley to receive, and the defendant to pay to Kelley, the money claimed; and the defendant, in accordance with the terms of the agreement, and according to the decision of the referee, duly paid the money claimed to Kelley.

Upon these pleas issue was taken.

There was also a special replication to the second plea alleging that by the recognized rules of boat races the referee had no jurisdiction until the race had commenced; that he had no power to interfere with the start, or to order a row over, and that as there, therefore, was no start and no race, Kelley was not the lawful winner of the race.

Upon this replication issue was taken.

From the statements in the case it appeared that the plaintiff and one Kelley, who were both watermen, agreed to row a sculler's race for 300*l.* a side, according to the terms of the written agreement set out in the second plea. The stakes were deposited with the defendant, and one Biffen was appointed referee. In sculling races between watermen it had been the invariable custom for the competitors to start themselves: but it was conceded that if either should make default in starting, and any question should in consequence arise, it would be in the power of the referee to determine such question. It is usual in such races for each competitor to appoint an umpire who attended the referee during the race, but did not discharge any judicial functions: such umpires were appointed for the race between the plaintiff and Kelley.

On the 27th of November, 1869, the day fixed for the race, the

1869

SADLER v. SMITH.

parties started, but a foul having taken place the referee ordered the men to row the race again the next day. On that day great delay and difficulty took place in the men starting themselves; and Kelley rowed to the referee's steamer, and complained to him that the plaintiff would not start fair. The referee then looked for but could not see the plaintiff: he then said to Kelley: "Go to your station, and tell Sadler he must start; and if he will not start, you must start without him." The plaintiff's umpire protested, and said to the referee: "You have no right to tell Kelley to start without telling the other man yourself." The referee when he gave the order intended it to be communicated to the plaintiff, and that the plaintiff should have a fair opportunity of starting, if he wished to do so. Upon receiving the order of the referee, Kelley rowed down the river towards the plaintiff, and conflicting evidence was given at the trial as to whether Kelley made any, and if any, what communication to the plaintiff; and there was also conflicting evidence as to whether the plaintiff had or had not opportunity of effecting a start on even terms. The referee was much too far off to hear what communication (if any) was made by Kelley to the plaintiff; he saw Kelley row within the starting limits down the river towards the plaintiff, whom he could not see at this time: he then lost sight of Kelley, and could not see what occurred between Kelley and the plaintiff. After the lapse of a minute or a minute and a half, he saw Kelley rowing up the river, but still saw nothing of the plaintiff. Kelley then, in sight of the referee, whose steamboat followed him, rowed over the whole of the course. When the plaintiff found that Kelley was rowing over the course, he followed and also rowed over the course to Mortlake. After Kelley had rowed over the course, his umpire claimed the race and stakes for him, and the plaintiff's umpire protested that he was not entitled to them, but offered no evidence and gave no reason in support of his protest, and no opportunity was afforded him of adducing any evidence. Thereupon, the referee awarded the race and stakes to Kelley, without hearing any evidence or taking any steps to ascertain if his order had been communicated to the plaintiff, and without having any means to give him the knowledge of the fact one way or the other.

The plaintiff on arriving at Mortlake, heard of the decision of

the referee; and on the next day, and before the defendant had paid the stakes to the plaintiff, gave notice to the defendant not to pay the amount of the stakes to Kelley. After the receipt of this notice, the defendant paid the whole of the stakes, 600*l.*, to Kelley.

The Chief Justice left the following questions to the jury :—

1. Did Sadler intend not to start?

2. Had the referee means by actual observation of forming a judgment that Sadler did not intend to start?

3. Was the order of the referee, that if Sadler would not start Kelley should start without him and row over, communicated to Sadler?

4. Was a fair opportunity of starting given to Sadler?

The jury returned the following answers to the questions :—

1. We think that Sadler did intend to start.

2. The referee had not the means of forming such judgment.

3. The order of the referee was not communicated to Sadler.

4. A fair opportunity of starting was not afforded to Sadler.

The Chief Justice directed a verdict for the plaintiff for 300*l.*, and reserved leave, subject to the findings of the jury, to move to enter a verdict for the defendant, on the ground that the decision of the referee was for the purposes of the action final.

The defendant accordingly obtained a rule nisi, which the Court of Queen's Bench afterwards discharged. (1)

Garth, Q.C. (*Tennant* with him), for the defendant. The decision of the referee was final, and the findings of the jury are immaterial. It must be taken that he had assumed the existence of everything necessary to give himself jurisdiction, and his decision, even although inconsistent with the view taken by the jury, cannot be overruled. In *Benbow* v. *Jones* (2) it was held that the decision of a steward at a horse-race, however arrived at, was final and binding upon all parties. In *Dines* v. *Wolfe* (3) a horse race was run in Australia according to the rules of the Australian Jockey Club, and it was objected that the horse coming in first had not carried the weight prescribed by them for a horse five years old, which was alleged to be his age : the stewards, who were to be judges of the

(1) Law Rep. 4 Q. B. 214. (2) 14 M. & W. 193.
(3) Law Rep. 2 P. C. 280, 290.

1869

SADLER v. SMITH.

race, held an investigation, and, after receiving evidence, decided that the horse coming in first was not five but four years old, had carried the proper weight, and was the winner of the match. It was held in the Privy Council that the decision of the stewards was conclusive; and Lord Chelmsford, delivering the judgment of the Court, proceeded to say: "Even supposing the stewards had dealt with the evidence in a very different manner from that in which they appear to have done, still, they being the judges as to what evidence is to satisfy their minds, they must decide for themselves, and their decision is final." Further, unless the decision of the referee was a nullity, the plaintiff cannot in this action for money received for his use recover the amount of his stake: the award ought to have been set aside.

Hawkins, Q.C. (*H. James, Q.C.*, and *Brickwood* with him), for the plaintiff, was not called upon.

KELLY, C.B. This appeal involves the consideration of a question arising in a great variety of cases, namely, how far the power of an arbitrator or referee to decide upon matters falling within his jurisdiction is to be subject to the control of a court of law.

In giving judgment in the present case, this Court has no desire to cast the slightest doubt upon the principle that whenever a referee, arbitrator, or umpire has given a decision upon a question within his jurisdiction, a court of law has no power to interfere. And if the referee in the case now before us, having the materials before him, had pronounced a decision, it would not have been within the province of any judge or any jury to overrule it. But on examining the facts of the case, it will appear that the referee had no jurisdiction; his jurisdiction was to be founded upon the performance of a condition which he himself prescribed, and that condition never was performed. Kelley was to tell the plaintiff that if he did not start, Kelley was to start without him. The referee thereby imposed a specific condition upon the fulfilment of which, but not otherwise, the start might take place. If the plaintiff on receiving the message from the referee had refused or forborn to start, and Kelley had started, the condition imposed by the referee would have been so far complied with as to give him jurisdiction to determine that a start had taken place. But we must

assume that the message from the referee was never communicated by Kelley to the plaintiff, who therefore had no means of knowing that he was to start at the time at which Kelley started. Therefore the start, which according to the terms imposed by the referee was to be a condition precedent to the race, never took place.

But before we decide in favour of the plaintiff, we must ascertain whether the circumstance that Kelley had not communicated the message to the plaintiff was brought under the consideration of the referee, and was determined by him. I quite agree that the referee had jurisdiction to determine this as well as the other matters occurring as to the race. The plaintiff's umpire had objected that the referee ought himself to communicate to the plaintiff the order to start, and this shews that the referee was fully aware that the order to start ought to be communicated to the plaintiff, and that if it were not, there could be no start, and consequently no race; when he ordered Kelley to communicate his message to the plaintiff he intended that the latter should have a fair opportunity to start. By the finding of the jury a fair opportunity was not afforded to the plaintiff to start. They have also found that the order to start was not communicated to the plaintiff. It has been argued on behalf of the defendant that the referee must be assumed to have found these two questions against the plaintiff; and I agree that if the question whether the order to start had been communicated to the plaintiff had been submitted to the referee, and if the referee, who was well aware of the necessity of communicating his order to the plaintiff, had had any knowledge on the subject, either from his own observation or from inquiring and receiving evidence, his decision would have been final, and the finding of the jury immaterial. But it appears from the statements in the case that the referee did not and could not either see or hear whether the order to start was communicated by Kelley to the plaintiff; and therefore it was not a matter within his own knowledge. After Kelley had rowed over the course, the referee did not know and took no means to ascertain whether his order to start had been communicated to the plaintiff; no opportunity of producing evidence was allowed; and yet the referee, in spite of the protest by the plaintiff's umpire, took upon himself to decide in Kelley's favour. No doubt he assumed that his order had been communicated to the

1869

SADLER v. SMITH.

plaintiff; but his decision was, in truth, no decision. It is as if a referee had been stationed at Kew to decide a race to be rowed from London, and seeing one of the parties arrive before the other had decided in favour of the one coming first, without being aware that he had started before the appointed time.

I scarcely need repeat that if any one of the questions left to the jury had been submitted to the referee, if he had taken it into consideration, and if he had decided upon it, whether or not he relied on his own observations, and whether or not he received evidence, his decision upon it would have been final. But on examining the facts of the case, it is found that there was no start according to the prescribed condition, and therefore there was no race; and the decision of the referee being upon a supposed start and upon a supposed race, is absolutely void, and it was unnecessary to take any proceedings to set it aside.

The plaintiff is entitled to recover back his stake, and the judgment of the Court below must be affirmed.

WILLES, J. I only wish to add, that I am clearly of opinion that, even if the referee had had insufficient means of determining whether Kelley had communicated the order to start to the plaintiff, yet, provided he had decided that a communication was made, although, in fact, it was not made, his decision would have been conclusive and final; but it appears to me that he took no means to ascertain whether Kelley had communicated his order to the plaintiff. He ought not, without ascertaining that cardinal fact, to have ordered the stakes to be paid over to Kelley.

CHANNELL, PIGOTT, and CLEASBY, BB., and KEATING, J., concurred.

Judgment affirmed.

Attorney for plaintiff: *Frank Richardson.*
Attorney for defendant: *C. Mossop.*

HARLAND *v.* THE MAYOR AND CORPORATION OF NEWCASTLE-UPON-TYNE.

1869
Nov. 24.

Costs—30 & 31 *Vict. c.* 142, *s.* 5—*Arbitration—Certificate—Discretion of Court—Sending back Award—Practice.*

An action for trespass to land was referred to an arbitrator with the powers of a judge at nisi prius, and costs of the cause to abide the event. He awarded 2*l.* 14*s.* to the plaintiff as damages, but did not certify for the plaintiff's costs in the action:—

Held, that the Court had power, under s. 5 of 30 & 31 Vict. c. 142, to allow the plaintiff his costs.

Held, further, that the bare statement by the arbitrator, on a subsequent ex parte application, that he thought the plaintiff ought to have his costs was not sufficient by itself to induce the Court to allow such costs, but that under the circumstances the award ought to be sent back to the arbitrator that he might have an opportunity of certifying for costs.

RULE, calling on the defendants to shew cause why the plaintiff should not be allowed his costs, or why the award in this case should not be sent back to the arbitrator to certify for the plaintiff's costs.

First count: Trespass to plaintiff's land, thereby causing a nuisance for which the plaintiff was fined in a proceeding before justices. Second count: That the defendants entered the plaintiff's land under a local statute, and acted in excess of the powers given by the statute.

Pleas: 1. Not guilty. 2. Leave and licence. 3. To first count, not possessed. 4. To same, justification under a local Act.

Issues thereon, and new assignment to 4th plea of excess.

Subsequently the action and all matters in difference were referred, by consent, to an arbitrator, who was to have all the powers of a judge at nisi prius, as to certifying, &c.; costs of the cause to abide the event, costs of the reference to be in the discretion of the arbitrator. The arbitrator, on the 30th of January, 1869, duly made his award, finding in effect that the defendants acted under the local Act, but were guilty of an excess in the exercise of their powers. The arbitrator awarded 2*l.* 14*s.* to the plaintiff as damages, and provided for the payment of the costs of the reference, but the

1869

HARLAND v. MAYOR OF NEWCASTLE.

award contained no provision respecting the costs of the action. No question was raised during the arbitration as to the giving of a certificate for costs. About six months after the award was published, the plaintiff applied to the arbitrator ex parte for a certificate for his costs. The arbitrator gave him a document certifying that "it appeared to me, at the hearing of the reference, that there was sufficient reason for bringing the action in the Court of Queen's Bench, and I hereby certify for the plaintiff's costs accordingly."

After several applications at chambers, the plaintiff obtained this rule. There was no affidavit by the arbitrator.

Herschell (1) shewed cause. This rule ought to be discharged. The certificate given by the arbitrator has no validity whatever. The certificate mentioned in s. 5 of 30 & 31 Vict. c. 142 (2), must be "on the record." This document has therefore no legal effect. There is, moreover, another objection, viz., that it was improperly obtained. The plaintiff should have given notice to the defendants that he was going to apply to the arbitrator for the certificate. The case therefore now stands as if no certificate at all had been given. The Court has no power, under s. 5 of 30 & 31 Vict. c. 142, to allow the plaintiff his costs in a case like this, which has been referred to and decided by an arbitrator. [He referred to *Sharp* v. *Eneleigh* (3), *McDougall* v. *Patterson*. (4)] Even if the Court has the power to allow the plaintiff his costs, this is not a case in which the Court will exercise that power. This action ought not to have been brought in a superior court. No point of importance was involved in its decision, but merely the question whether the defendants had acted in excess of their powers, and if so, what damage they had thereby caused. The small amount of the damages

(1) In the Bail Court, before Hannen, J.

(2) 30 & 31 Vict. c. 142, s. 5, enacts, "If in any action commenced after the passing of this Act in any of the superior courts of record, the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort . . . he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

(3) 20 L. J. (Ex.) 282.

(4) 11 C. B. 755; 21 L. J. (C.P.) 27, 31, 32.

awarded, 2*l.* 14*s.*, shews the trivial nature of the action. For the same reasons the Court will not in the exercise of a discretionary power send back the award to the arbitrator, especially as it is not shewn that the arbitrator would certify for costs if the award were sent back. The certificate already obtained proves nothing, as it was obtained ex parte. There is no affidavit by the arbitrator. In order to induce the Court to send back the award, it should be shewn that it was through mistake that the arbitrator omitted to certify, as in *Caswell* v. *Groucutt.* (1) This is not shewn here.

Crompton, in support of the rule.

[HANNEN, J., intimated that he had no doubt that the Court had power, under s. 5 of 30 & 31 Vict. c. 142, to allow the plaintiff his costs, and directed that the argument should be confined to the question whether this was a case in which the power to allow the plaintiff his costs, or to send back the award, ought to be exercised].

There is enough apparent on the affidavits to induce the Court to allow costs. It appears from the pleadings that a question of title might have been raised and this renders the case fit to be brought in a superior court. It also appears by the certificate given that the arbitrator thought at the time of the arbitration that the plaintiff ought to have his costs. This is enough to induce the Court to exercise its discretion, and give the costs. At least, however, the award should be sent back to the arbitrator, that he may exercise the jurisdiction as to the costs which has been conferred on him, and which he has not formally determined. The certificate he has already given shows his view of the case, and is in effect a statement that it was by a mistake that he did not certify for costs to the plaintiff.

HANNEN, J. I have already expressed my opinion that the Court has power, under s. 5 of 30 & 31 Vict. c. 142, to allow the plaintiff his costs. There may be very good reasons why the facts of a case should be brought before the Court or a judge, although it has been referred to arbitration. Indeed, in some cases the Court or a judge may be already fully possessed of the facts of a case that has been referred; as, for instance, when a case is referred by judge's order

(1) 31 L. J. (Ex.) 361.

BIBL. LOUBIN

1869

HARLAND v. MAYOR OF NEWCASTLE.

to the master. I think, therefore, that I have the power to allow the plaintiff his costs.

Having that power, the next question is, ought the Court to exercise it? I certainly do not intend to lay down any general rule that the Court ought to accept the bare statement of an arbitrator as to what he intended at the time of the reference. I should wish to know the facts of the case more fully than I know them at present, and I should not exercise the power of giving the plaintiff his costs unless further facts were brought to my knowledge.

I think, however, under the circumstances, that the award should be sent back to the arbitrator. The question whether the plaintiff should have his costs of the action, which was one of the matters which the arbitrator had power to decide, has not been considered by him. He has, therefore, not exercised all his powers. It is in the highest degree improbable that the arbitrator will change the opinion that he has already expressed, but it is just possible that he might do so. He ought to have the opportunity of formally deciding upon the matter. I hope that the parties will not go to any unnecessary expense in sending back the award, but, if insisted upon, it must go back in order that the arbitrator may be able to certify. As this is a slip of the arbitrator for which neither party is answerable, the rule will be absolute to send back the award, without costs.

Rule absolute without costs to send back the award.

Attorneys for plaintiff: *Young, Maple, Teesdale, & Nelson.*
Attorney for defendant: *John Tucker.*

RICHARDSON *v.* DU BOIS.

1869
Nov. 8.

Husband and Wife—Authority of Wife, when Husband a Lunatic—Necessaries.

The plaintiff sued the defendant for repairs done to the inside of the defendant's house, which he held on a long lease. The orders were given by the defendant's wife, who was residing with her children in the house, the defendant being at the time a lunatic and in an asylum. After some of the repairs had been done, the plaintiff became aware that the defendant was a lunatic; but he continued to do the repairs under the wife's directions. The repairs were necessary for the house; but after paying for the defendant's maintenance in the asylum, the wife received the whole of the defendant's income, and had also an allowance from friends of the defendant, and what she received was sufficient for all purposes, including the repairs to the house:—

Held, that the defendant was not liable: for that the authority of a wife to pledge her husband's credit was no greater in the case of a lunatic than in the ordinary case of husband and wife.

DECLARATION for work and labour, and materials, &c.

Plea: Never indebted.

Issue thereon.

At the trial before Hannen, J., at the sittings in London after Trinity Term, 1868, it appeared that the plaintiff was a house-decorator, and was suing for the balance of an account of 117*l.* 5*s.* 10*d.*, after giving credit for 60*l.* which he had received, for repairs which he had done to the defendant's house in Thurloe Square, in 1867, which the defendant held on a long lease with a covenant by him to keep the premises in repair. The plaintiff received the orders from the wife of the defendant, the defendant at the time being a lunatic in an asylum. After the amount of repairs paid for had been done, the plaintiff became aware that the defendant was a lunatic; but he continued the repairs under the wife's directions. The defendant's income had been reduced by his illness to 350*l.* a year; the whole of this income, after paying for the defendant's maintenance in the asylum, had been paid over to the wife (who continued to reside in the house with her children), and in addition to this she had received an allowance from the defendant's partner and other friends, making, in the whole, 221*l.* in the course of two years and four months.

The jury found, in answer to questions by the judge, that the repairs were necessary to the house, and the charges reasonable

1869

RICHARDSON v. DU BOIS.

and proper; and that the money which the wife had received was sufficient for all purposes, including the repairs.

A verdict was directed for the defendant, with leave to move to enter it for the plaintiff.

A rule was obtained accordingly to enter the verdict for 51*l.* 5*s.* 10*d.*, the amount claimed, on the grounds: 1. That the contract made on behalf of the defendant was for the benefit of the defendant's property. 2. That the work done was proper and necessary. 3. That the defendant was bound by the acts of his wife under the circumstances proved at the trial.

Keane, Q.C. (*Robins* with him), shewed cause, and contended that the lunacy of the husband made no difference in the implied authority of a wife to pledge her husband's credit. In *Davidson* v. *Wood* (1), and *Read* v. *Legard* (2), a lunatic's estate was held liable for necessaries supplied on the order of the wife; but in those cases there had been no sufficient allowance received by the wife. There were numerous cases, of which it was sufficient to cite one, *Mizen* v. *Pick* (3), in which it had been held that a husband living apart from his wife was not liable for necessaries ordered by the wife if the wife had received a sufficient allowance, and it was immaterial that the tradesman had no notice of the allowance.

O'Brien, Serjt., and *Beasley*, were then called upon to support the rule. They contended that the defendant was liable: this was not the simple case of goods supplied to the wife, but money laid out and work bestowed for the protection of the lunatic's estate. The defendant was bound by the lease to keep the house in repair, and the jury had found that the repairs were necessary. In *Williams* v. *Wentworth* (4) it was held that a lunatic or his estate was liable for expenses necessary for the protection of his person and estate.

THE COURT (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.) were clearly of opinion that on the above findings the defendant was entitled to the verdict. The agency of the wife of a lunatic and the authority to pledge the husband's credit did not differ from those ordinarily implied from the relation of husband and

(1) 1 De G. J. & S. 465; 32 L. J. (Ch.) 400.
(2) 6 Ex. 636; 20 L. J. (Ex.) 309.
(3) 3 M. & W. 481.
(4) 5 Beav. 325.

wife; and as it was found that the wife had received money sufficient and applicable to the payment of these necessary repairs, the defendant was not liable any more than if he had been sane, and had given his wife the money, and directed her to give the orders for the repairs and pay for them.

1869

RICHARDSON v. DU BOIS.

Rule discharged.

Attorney for plaintiff: *J. Wright.*
Attorney for defendant: *J. Aldridge.*

DIGNAM *v.* BAILY.

Nov. 8.

Practice—Costs—Verdict on Issue going to the Merits, entitles Defendant to the General Costs, although founded on a Bad Plea.

Declaration that the plaintiff obtained judgment and execution against B., and the defendant, as sheriff, arrested him but allowed him to escape. Pleas: 1. Not guilty. 2. That B. produced to the defendant's officer a certificate of the registration of a deed between B. and his creditors, within the meaning of s. 198 of the Bankruptcy Act, 1861, whereupon the officer discharged B. Issue joined, and demurrer to 2nd plea; and replication, that the plaintiff's cause of action against B., in respect of which judgment was recovered, first accrued after the making and after the registration of the deed, and the plaintiff was not one of the creditors of B. bound by the deed. Issue joined on the replication, and demurrer. Judgment was given on the demurrers, that the 2nd plea was bad in substance, and the replication good. A verdict was afterwards found for the plaintiff on not guilty, the jury assessing the damages at the amount of the judgment debt; and the Court afterwards, on the facts, directed the verdict on the replication to the 2nd plea to be entered for the defendant:—

Held, that the defendant was entitled to the postea, and to have the judgment entered for him: for that it was immaterial that the 2nd plea appeared on the record as bad, as the replication and verdict cured the defect, and shewed that the defendant had succeeded on the merits.

DECLARATION, that the plaintiff on the 11th of December, 1866, obtained judgment against one Thomas Brassington, that a ca. sa. was sued out and delivered to the defendant, as sheriff of Kent, commanding him to arrest Brassington to satisfy the plaintiff's debt and interest; that defendant arrested Brassington, and afterwards allowed him to escape.

Pleas: 1. Not guilty. 2. That after defendant's officer had taken Brassington in execution, Brassington produced to the officer, and gave him a copy of, the certificate from the Court of Bank-

1869
DIGNAM
v.
BAILY.

ruptcy of the due registration of a deed made and executed between Brassington and his creditors, within the true intent and meaning of s. 198 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), whereupon defendant's officer released Brassington.

Issue joined.

Demurrer to 2nd plea, and joinder.

Replication to 2nd plea, that plaintiff's cause of action against Brassington, in respect of which judgment was recovered, first accrued after the making and after the registration of the deed, and plaintiff was not a creditor of Brassington in respect of the said cause of action when the deed was made, nor when the same was produced and left for registration, nor until after the certificate was granted; and plaintiff was not one of the creditors referred to or intended to be bound by the deed.

Demurrer, and joinder.

Issue was also taken and joined on this replication.

The Court decided, after argument of the demurrers in Hilary Term, 1868, that the plea was bad in substance and the replication good in substance, and judgment was entered accordingly. (1)

The issues in fact were afterwards tried, and the jury found a verdict for the plaintiff on not guilty, assessing the damages at the amount of the judgment debt, and leave was reserved to move to enter a verdict for the defendant, if the Court should be of opinion, on the facts, that the plaintiff's cause of action was barred by the deed. (2) The Court, in Easter Term, 1869, decided in the affirmative, and made the rule absolute to enter the verdict for the defendant. (3)

A summons was taken out by the plaintiff calling on the defendant to shew cause why the postea should not be delivered to the plaintiff, and why the verdict should not be entered for the plaintiff on the plea of not guilty.

(1) See Law Rep. 3 Q. B. 178.

(2) The facts which appeared on the trial were, that Brassington executed on the 10th of June, 1866, the deed under the Bankruptcy Act, 1861, which was duly registered, and contained a release by all the creditors of their respective debts; at that time a bill of exchange accepted by Brassington and indorsed to the plaintiff was running, and became due on the 20th of July. On the 27th of November the plaintiff commenced an action on the bill against Brassington, who did not plead the deed, and judgment was signed on the 11th of December, 1866.

(3) See Law Rep. 4 Q. B. 376.

1869

DIGNAM v. BAILY.

On the hearing of the summons Mellor, J., made an order that "the verdict be entered for the plaintiff on the plea of not guilty, but as the defendant succeeded on the issue raised by the replication to the 2nd plea, the postea will be delivered to the defendant."

A rule was then obtained by the plaintiff calling on the defendant to show cause why the order should not be amended, by striking out the part relating to the postea, and why the postea should not be delivered to the plaintiff, and why the judgment should not be amended and entered according to law.

Raymond shewed cause. The order is right, and the defendant is entitled to the postea; for on the whole record the defendant is entitled to judgment. Looking at the issue raised on the replication to the second plea, and the finding upon it, the defendant has established that he was justified in allowing the judgment debtor to go free. It is true that the second plea has been held bad; but since the Common Law Procedure Act, 1852, enables parties to demur and plead to the same pleading, each line of pleadings must be treated and looked at separately, just as under the old system one plea could not be looked at to aid another. Thus in *Kirk* v. *Nowill* (1), Buller, J., says: "There never was such an idea before, as counsel have suggested, that one plea might be supported by what was contained in another. Each plea must stand or fall by itself; they are as unconnected as if they were on separate records." So again, Patteson, J., in *Gwynne* v. *Burnell* (2): "It seems to me to be essential to the due course of pleading, and to avoid confusion, that no blending of pleas should in any instance be permitted, and that whatever may be the number of pleas placed upon the record, each plea should be treated, both in itself and in its consequences, as if it were the only plea on the record." In *Galloway* v. *Jackson* (3), Parke, B., delivering the judgment of the Exchequer Chamber, says: "Each set of pleas is independent of the other, and the defendant below has a right to have the case disposed of as if each plea had been the only one on the record." Secondly, it is a well established rule, from the

(1) 1 T. R. at p. 125. (2) 7 Cl. & F. at p. 641.
(3) 3 M. & G. at p. 976.

1869

DIGNAM v. BAILY.

earliest times, that an insufficient pleading is cured by pleading over and verdict.

[COCKBURN, C.J. If there had been no pleadings, and the facts had been proved which are now on the record, the defendant would have been entitled to succeed.]

Yes. The plaintiff, having got judgment on the demurrers, should have withdrawn the issue in fact. In Littleton, sect. 366, it is laid down "Albeit a man cannot in any action plead a condition which toucheth and concerns a freehold without shewing writing of this, as is aforesaid, yet a man may be aided upon such a condition by the verdict of twelve men taken at large in an assize of novel disseisin, or in any other action where the justices will take the verdict of twelve jurors at large." Lastly, the finding of damages by the jury is of no consequence; they were only assessed contingently, and they are not entered on the record, nor would the entry prevent the defendant being entitled to judgment and general costs. The law on this subject is laid down most clearly in Gray on Costs, chap. iii. p. 33: "When the issues have been found by the jury, the first question which presents itself is, which party is entitled to the postea? There is no doubt that, as a general rule, if the plaintiff has succeeded on any part of his declaration, he is entitled to it: *Smith* v. *Edwards* (1); and he so succeeds if the pleas on which issues are found for the defendant do not answer the whole of the cause or causes of action contained in the declaration. The plaintiff is in that case entitled to, and recovers damages in respect of, that portion of the cause of action not so answered. His action has been effective, and he has what is called the general verdict. But if the pleas on which issues are found for the defendant do answer the whole of the cause or causes of action in the declaration, the plaintiff is entitled to no damages. His complaint, or cause of action, has been entirely answered, and the defendant has the general verdict, and is entitled to the postea: *Smith* v. *Brown* (2); although various other issues may be found for the plaintiff, those issues arising in consequence of the defendant setting up distinct answers to the same part of the cause of action under the statute 4 Anne, c. 16, already considered; for it will be found that it is only where there is double pleading that the defendant can have

(1) 4 Dowl. 621. (2) 5 Dowl. 736.

the general verdict, and yet the plaintiff have issues found for him. In some cases a confusion is created on this subject from damages being found for the plaintiff, and entered on the postea, although the defendant has the general verdict in the manner already explained. *Staley* v. *Long* (1), and *Smith* v. *Brown* (2), are examples of this." *Staley* v. *Long* (1) was an action of trespass to land. Pleas: 1. Not guilty. 2. That the close was not the plaintiff's. 3. A right of way in the defendant. The verdict was for plaintiff on 1 and 2, with 1*s.* damages, and for defendant on 3; and Tindal, C.J., says: "The entry of 1*s.* damages is a mere slip of the associate: he perhaps thought the plaintiff entitled to the general costs of the cause. I am inclined to think the defendant is." And Bosanquet, J., says: "The whole of the trespass has been justified, and the defendant is entitled to succeed on the third plea. He has unnecessarily put the plaintiff to the expense of proving the two first issues, and on them the defendants will be entitled to costs; but the postea ought to have been delivered to the defendant." And Coltman, J.: "The postea should be delivered to the party who has substantially succeeded, that is the defendant."

Griffits, in support of the rule. The plaintiff is entitled to the postea. The second plea having been demurred to and held bad in substance, judgment is entered accordingly, and all the subsequent pleadings on that plea are immaterial. The judgment would be inconsistent if it were entered for the defendant after judgment has already been entered for the plaintiff on this very plea.

[LUSH, J. Must we not look at this issue alone? and looking at all the facts so disclosed on the record, the verdict on the replication being entered for the defendant, the defendant has succeeded on an issue on the merits going to the whole cause of action.]

The replication cannot be called in aid to cure the plea, the plea having been demurred to and judgment given for the plaintiff. Moreover, if the replication and verdict upon it could be called in aid to cure the plea, the facts as found are not conclusive of the merits being in favour of the defendant. The issue raised was not whether the plaintiff's judgment was affected by the deed or cer-

(1) 3 Bing. N. C. 781. (2) 5 Dowl. 736.

1869

DIGNAM v. BAILY.

tificate, and the judgment debtor entitled to his discharge, but whether the plaintiff's original cause of action on which the judgment was recovered was bound by the deed, and the verdict is that it was. Therefore, although the actual dates do not appear on the record, the record shews conclusively, although only by inference, that the execution debtor had an opportunity of pleading the deed and did not. *Rossi* v. *Bailey* (1) decided that in such a case the debtor could not avail himself of the certificate as a protection. The question is therefore raised on this record, whether that doctrine extends to the sheriff, or whether, although the debtor cannot avail himself of the protection as against the creditor, the sheriff may yet set up the certificate as a justification for discharging the debtor out of custody; and this was really the point intended to be raised.

[HANNEN, J. The point was not made at the trial.]

COCKBURN, C.J. I am of opinion that the order of my Brother Mellor was right. I think there can be no doubt (whatever the result might have been, had other issues been raised, and other facts been on the record, which Mr. Griffits says existed) that, looking at the whole record, and at the facts as appearing on the record, including the finding of the jury, the defendant established a defence on the merits, and he is therefore entitled to the judgment and to have the postea.

LUSH, J. I am of the same opinion. The replication by negativing a fact, which was material and ought to have been alleged in the plea, coupled with the finding of the jury, supplies that the want of which made the plea bad. The issue, thus raised though informally, having been found for the defendant, he has established a defence to the whole cause of action, and is therefore entitled to the postea.

MELLOR and HANNEN, JJ., concurred.

Rule discharged.

Attorneys for plaintiff: *Harper, Broad, & Manby.*
Attorneys for defendant: *Palmer, Palmer, & Bull.*

(1) Law Rep. 3 Q. B. 621.

BARBER *v.* FLEMING.

1869
Nov. 15.

Chartered Freight, Interest in—Marine Insurance.

The plaintiff, on the 7th of August, 1866, chartered his ship *C.*, "now lying at Bombay," for a voyage from Howland's Island to a port in the United Kingdom, for a full cargo of guano, freight to be paid at port of discharge; the ship to be at the island on or before the 1st of June, 1867, or the charterer to have the option of declaring the charter void. The plaintiff, on the 7th of September, 1866, effected an insurance with the defendant, at and from Bombay to Howland's Island, while there, and thence to any port in the United Kingdom, on freight chartered or otherwise, valued at 3600*l.*, in the ship *C.*; and it was made lawful for the ship to sail to, touch, and stay at any ports whatsoever, without prejudice to the insurance, which was against the usual perils. The ship sailed from Bombay, in ballast, on the 4th of October, 1866, for Howland's Island (one of the Chincha islands), intending to call at a port in New Zealand for water. She got on shore on the coast of New Zealand on the 25th of December, and was so much damaged that the plaintiff was obliged to abandon the voyage:—

Held, that, as the ship had sailed in ballast from Bombay with the sole object of going to Howland's Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced; and that the plaintiff could recover the loss under the policy.

DECLARATION, on a policy of insurance, from Bombay to Howland's Island and thence to the United Kingdom, on freight, chartered or otherwise, in the ship *Cambodia*, underwritten by the defendant for 100*l.*, to recover freight under a charterparty from Howland's Island to Great Britain, that the ship being wholly lost on her way from Bombay to Howland's Island, by perils insured against, the chartered freight was wholly lost.

The material pleas were: 5. That the ship was not lost by the perils insured against. 6. That the chartered freight was not lost by the perils insured against.

Issue thereon.

At the trial before Hannen, J., at the sittings in London after Hilary Term, it appeared that the agents of the owners of the barque *Cambodia*, then at Bombay awaiting orders for her homeward voyage, on the 7th of August, 1866, chartered the vessel at Liverpool to P. W. Penhallow.

The following are the material parts of the charterparty. It was made between the agents for the owners of the ship *Cambodia*, now lying in the harbour of Bombay, of the first part, and P. W.

1869

BARBER v. FLEMING.

Penhallow, of the second part, and chartered the whole vessel for a voyage from Howland's Island, situated in lon. 176, 30 W., and lat. 0.47 N., to a port of discharge in Great Britain . . . for a full and complete cargo of guano at Howland's Island (which the charterer engaged to provide), at the rate of 65s. per ton of 2240 lbs. weight delivered of guano. Freight to be paid at the port of discharge. The ship to be at Howland's Island on or before the 1st of June, 1867, or the charterer to have the option of declaring this charter null and void.

On the 7th of September, 1866, the plaintiff, on behalf of the owners of the *Cambodia*, effected an insurance at Lloyd's, which the defendant underwrote for 100*l*.

The following are the material parts of the policy. The insurance was "at and from Bombay to Howland's Island, while there, and thence to any port or ports, place or places of call and discharge in the United Kingdom, in any order . . . upon the ship or vessel called the *Cambodia*." It was made "lawful for the ship in this voyage to proceed, and sail to, and touch and stay at any ports or places whatsoever, without prejudice to this insurance," which was "2000*l*. on freight, chartered or otherwise, valued at 3600*l*.;" the perils being, inter alia, of the seas; with the usual suing and labouring clause.

The *Cambodia* sailed from Bombay for Howland's Island (one of the Chincha islands), in ballast, on the 4th of October, 1866, intending to call at Auckland in New Zealand to complete her supply of provisions and water. She got out of her course, and struck on the bar of Manakan harbour in New Zealand on the 25th of December. She was got on to the sand, and surveys were made, and the captain endeavoured to borrow money for repairs, but was unable to get any except on a bottomry bond at 35 per cent., and on the condition that the captain should charter the vessel to the lender for a cargo of timber from New Zealand to England. Communication was made to the owners in England; they refused to allow any repairs to be done; and in March, 1867, they gave notice of abandonment to the underwriters on ship, and in April to the underwriters on freight. The money, which had been advanced in the meantime, 3500*l*., was insufficient for the repairs; and an agent from England, acting on behalf of the owners and under-

writers on ship, came out in June, 1867, and, after surveys and consultation, he determined that the best thing to do was to abandon the ship to the holder of the bottomry bond, which was accordingly done; and at the trial the agent deposed he was still of opinion that that was the best course. Ultimately the ship came home in March, 1868, with the cargo of timber.

A verdict was entered by consent for the plaintiff for 100*l.*, with leave to move to enter the verdict for the defendant, the Court to have power to draw inferences of fact.

A rule was accordingly obtained to enter a verdict for the defendant, on the ground that there was no loss of freight within the policy, and that no freight attached, and that the plaintiff abandoned the chartered voyage, and so lost the policy by his own act. (1)

Manisty, Q.C., shewed cause. The facts are shortly these. The plaintiff having a charter on his ship at Bombay for a cargo from Howland's Island to the United Kingdom, and a valued policy with the defendant on freight, chartered or otherwise, on a voyage from Bombay to Howland's Island, and thence to the United Kingdom, the ship sailed from Bombay in ballast direct for Howland's Island, and was so much damaged by perils of the sea on the coast of New Zealand, that the ship and the voyage from Howland's Island were properly abandoned, although the ship ultimately brought a cargo of timber home from New Zealand. The only question is, whether, the ship never having reached Howland's Island, the chartered freight can be said to have been lost. Had she been sailing on a seeking voyage, no doubt there could be no loss until she had got to port and obtained a cargo; but here there was a charterparty; and freight under an existing charterparty is clearly an insurable interest, and may be recovered although the ship be lost before getting to her port of loading. The cases are collected in 1. Arnould on Insurance, 3rd ed., p. 419–420; and the case most

(1) As to the last ground of the rule, the Court intimated more than once during the argument that they had not intended to grant it on that ground, and that by the reservation at the trial it could not have been meant to leave to the Court the question whether the voyage had been properly abandoned. See also the judgments, post.

1869

BARBER v. FLEMING.

in point is *Davidson* v. *Willasey*. (1) In that case, a ship was chartered from Liverpool to Jamaica, there to take in a full cargo for Liverpool; the shipowner effected a valued policy on freight at and from Jamaica to the United Kingdom; and while at Jamaica the ship was lost by storms after taking part only of her cargo on board; and it was held that the owner was entitled to recover for a total loss.

[COCKBURN, C.J. That is very far from the present case. There the ship had reached the port at which she was to take the cargo under the charterparty.]

The principle of the judgments of the Court apply. Thus, Lord Ellenborough, C.J., says (2): "The interest intended to be insured was the freight which the assured would have earned under the terms of the charterparty, if the voyage had not been stopped by the perils insured against, which has been held for upwards of twenty years past to be an insurable interest as freight. Then the question is, whether the assured were in the prosecution of that interest, so as to have acquired an inchoate right to the freight at the time when the loss happened. We cannot allow any weight to the arguments used to prove that they were not, without setting aside the cases of *Thompson* v. *Taylor* (3), and *Horncastle* v. *Suart* (4), which are precise upon this point; and there seems to be no reason for disturbing them. The distinction between this case and *Forbes* v. *Aspinall* (5) has been truly stated, and is a clear one: there, there was no charterparty, and the valuation of the policy was made with reference to freight upon all the goods intended to be carried on the voyage insured, a part only of which goods were lost, and the rest never were or might have been obtained; so that the loss was not total within the meaning of the valuation: but here the valuation is made with reference to the freight under the charterparty, the whole of which the plaintiffs have been prevented from earning by one of the perils insured against. The loss, therefore, is total within the meaning of the policy." And Le Blanc, J., says (6): "The prior cases determined that in the case of a freight policy, where the assured has entered into a contract for freight, under

(1) 1 M. & S. 313.
(2) 1 M. & S. at p. 316.
(3) 6 T. R. 478.
(4) 7 East, 400.
(5) 13 East, 323.
(6) 1 M. & S. at p. 317.

1869

BARBER v. FLEMING.

which, except for the wrongful act of the party with whom he has contracted, he would be in a condition to earn his freight, if the voyage were not stopped by a peril insured against; there, if the voyage has commenced in which the freight is to be earned, and be stopped by any of those perils, the assured will be entitled to recover to the full amount."

[COCKBURN, C.J. Had the chartered voyage here commenced?]

Not strictly speaking; but the voyage covered by the policy had; and the question is, whether the risk on the chartered freight had not attached. In the first place, the freight is paid and calculated, no doubt, not only in respect of the voyage from Howland's Island home, but from Bombay to Howland's Island, where the ship was at the time of the charter. And how can a ship-owner, having such a charter as this, insure the chartered freight against the perils of the voyage while the ship is on her way from Bombay to Howland's Island, except in the form of the present policy for the whole voyage?

[BLACKBURN, J. I find this in Phillips on Insurance, § 335. "A vessel being chartered from A. to B., the interest in the freight commences under the charterparty on the vessel's sailing for A., either in ballast or with a small quantity only of goods for B." And Mr. Phillips explains the last qualification, that if the vessel were going on a voyage in the interim it would be another thing; but he lays it down as a general proposition that if she is starting solely with a view to the chartered freight, the interest would attach on her sailing for A.]

That is exactly the present case; the vessel sailed for Howland's Island in ballast. In the common case of a vessel sailing out and home for a cargo under a charter home, could it be said you could not recover under a policy on the voyage out and home for the loss of the chartered freight because the vessel never reached the port of loading? For the purpose of the policy the voyage out and home is one, though the chartered voyage may be part only of it. The vessel being at Bombay, the owner, having a charter from Howland's Island home, wants to insure on the whole voyage, not only his vessel, but the beneficial contract which he has got, and which is just as much in danger of being lost by the voyage

1869

BARBER v. FLEMING.

to Howland's Island as it is on the voyage thence home. It cannot be denied that freight under a charter is an insurable interest; and the interest must commence, at all events, as soon as the vessel sails on the voyage within the policy for the sole purpose of earning the chartered freight.

Milward, Q.C., and *Fullarton*, in support of the rule. There are many peculiarities in this case which distinguish it from any case cited. The charterparty is not in the usual form, that the ship, being at Bombay, shall with all convenient speed sail thence for Howland's Island, and there take in the cargo; the only stipulation is, that she shall be at Howland's Island by the 1st of June, about ten months after the date of the charter, the voyage from Bombay direct taking about three months. The plaintiff, therefore, was at liberty to go anywhere, so long as he reached the port of loading by the specified time. The plaintiff, then, having this charter, does not insure this specific freight, but, in general terms, "freight chartered or otherwise" from Bombay to Howland's Island, and thence to Great Britain, with leave to call at any intermediate ports; so that the policy was wide enough to cover freight earned between any ports from Bombay to Howland's Island; and it was a valued policy.

[BLACKBURN, J. If the ship had had freight from Bombay or any intermediate port to Howland's Island, the policy would seem wide enough to cover it. But she sailed in ballast direct for the island. Or had she gone on a seeking voyage, the case would have assumed a different aspect, and it might be a very different question, whether in that case the interest in this chartered freight could be said to have commenced. But the ship having sailed in ballast for the sole purpose of earning this chartered freight, the question is reduced to this, under these circumstances can it be said there was such an interest in the freight that it was at risk and so lost? Some cases have been cited to shew that there was an inception of the risk; can any be cited to the contrary?]

Sellar v. *M'Vicar* (1) shews that while sailing from Bombay to Howland's Island the voyage as to the chartered freight had not begun.

(1) 1 B. & P. (N. R.) 23.

1869

BARBER v. FLEMING.

[COCKBURN, C.J. The ground of that decision seems to have been that there had been a deviation from the voyage insured. There is no deviation here. Nor any plea to raise the defence of deviation, if there had been.]

Here there was nothing done under the charterparty so as to make the freight an inchoate interest; it was nothing more than a contingent interest. In all the cases already cited, or which can be found bearing on the subject, the shipowner was bound by the charterparty to start at once for the port of loading. Thus, in *Thompson* v. *Taylor* (1), there was an express stipulation in the charter that the ship should directly proceed from the Thames to Teneriffe, the port of loading; and she did so sail, and was captured before reaching Teneriffe, and it was held that the interest in the freight had commenced; but Lord Kenyon, C.J., put it expressly on the ground that something had been done under the charter. He says (2): "The property against the loss of which the assured wishes to be indemnified, is that which he had a right to receive under the charterparty; and it seems now admitted that if the contract had its inception, if anything were done under it by the plaintiff who let his ship to hire, his right to freight commenced. That depends on the words of the charterparty, which are 'that the ship should on or before the 9th of February depart out of the river Thames, and directly proceed to Port Orotava in Teneriffe, &c., load there, and then sail and proceed to Barbadoes.' Now, it seems to me that the argument on behalf of the plaintiff is well founded, that this was an inception of this contract by the owner of the ship: for the ship did sail from the Thames towards Teneriffe, and was captured in the course of that voyage."

[BLACKBURN, J. Lord Kenyon says, in effect, the owner being bound to sail at once under the terms of the charter, and having done so, that is enough; but he does not say, that if the vessel had sailed with the intention of performing the charterparty, though not bound to do so, that would not have been sufficient.]

Again, in *Everth* v. *Smith* (3), Lord Ellenborough, C.J., says: "This was an insurance on freight generally, not on any specific freight; the charterparty is only material to shew that upon the

(1) 6 T. R. 478. (2) 6 T. R. at p. 481.
(3) 2 M. & S. 278, 284.

1869

BARBER v. FLEMING.

ship's arrival at Riga there was an inchoation of the risk." So here there could be no inchoate interest in the chartered freight until the ship reached Howland's Island.

[COCKBURN, C.J. How can a shipowner, when he has got a charter like this, by which he is to send his ship from A. to B., and there take a cargo for C., insure the risk of losing the chartered freight while the ship is going from A. to B. otherwise than in the way the plaintiff has done?]

The plaintiff might have insured on a voyage from Bombay to Howland's Island and thence to England, the risk being on chartered freight from Howland's Island to England; as was done in *Potter* v. *Rankin*. (1)

[COCKBURN, C.J. That, the shipowner says, is what he has done in effect.

BLACKBURN, J. Although the policy is worded so as to cover something else.]

The policy is in general terms, and will cover any freight obtained; and it appears that other freight was earned, and so the plaintiff cannot recover for loss of freight: *Everth* v. *Smith* (2); *Benson* v. *Chapman*. (3) In *Barclay* v. *Stirling* (4), the underwriters were allowed to set off the freight earned.

[COCKBURN, C.J. In those cases the freight was earned on the same voyage. That was not so here.

BLACKBURN, J. If the ship is not totally destroyed, and is afterwards repaired, and earns freight on a different voyage, that can be no answer to a claim for loss of freight on a particular voyage. Moreover, as to setting off the freight earned, if any were earned, there is no plea enabling the defendant to take advantage of it.]

Here there was an election to repair, and after that the owners cannot claim for a constructive total loss by means of a subsequent notice of abandonment: *Benson* v. *Chapman*. (3)

[Counsel also contended that, on the facts, the shipowner had voluntarily abandoned the voyage; and on this they cited the

(1) Law Rep. 3 C. P. 562.
(2) 2 M. & S. 278.
(3) 2 H. L. C. 696; 8 C. B. 950.
(4) 5 M. & S. 6.

judgement in *Potter* v. *Rankin* (1), but the Court intimated that if the defendant's counsel had intended to rely on this point they ought to have insisted on the question going to the jury.] 1869 BARBER v. FLEMING.

COCKBURN, C.J. I am of opinion that this rule must be discharged. The first question is, whether the insured can recover upon this policy for freight to be earned under a charterparty, by which the ship was to go from Bombay to Howland's Island, there take a cargo, and bring that cargo from Howland's Island to England; the facts being that the vessel, having started from Bombay upon the voyage, had been prevented by perils of the sea from ever reaching Howland's Island. I have no hesitation whatever in saying that, in my opinion, the insured can recover upon this policy. The authority referred to by my Brother Blackburn, from Phillips on Insurance, § 335, is directly in point; and I think, independently of authority, on principle, it is clear that a party can recover upon a policy adapted to such a voyage. From the moment that a vessel is chartered to go from port A. to port B., and at port B. to take a cargo and bring home that cargo to England, or to take it to any port, which I will call port C., for freight, the shipowner, having got such a contract, has an interest unquestionably in earning the freight secured to him by the charter; and having such an interest it is manifest that that interest is insurable; and he loses the freight and benefit of his charter just as much by the ship being disabled on her voyage to the port at which the cargo is to be loaded and from which it is to be brought, as he would lose it by the disaster arising from the perils insured against between the port of loading and the port of discharge. It is therefore an appreciable, tangible interest, and I entertain no doubt it is an interest that can be insured.

It is a fallacy to say the freight is earned simply by bringing the cargo from the port of loading to the port of discharge; the freight is earned by the whole voyage which it is necessary to make to fetch the cargo and bring it home. The shipowner who sends his ship empty upon the voyage, and who, did not the freight cover the whole expenditure, would get no return for it, takes care to get freight commensurate with the expense and risk of the ship going

(1) Law Rep. 3 C. P. at pp. 567–568.

1869

BARBER v. FLEMING.

to the port of loading as well as coming home from thence with cargo.

The only question here is, at it seems to me, whether, under the particular circumstances and terms of this charterparty, the policy would apply. Our attention has been called to the fact that by the terms of the charterparty the shipowner was at liberty, after his vessel left Bombay, to go upon other voyages with other cargoes to other ports, before he came to Howland's Island, which was the port at which he was to load the particular cargo to which this charter refers; it being only stipulated that his vessel should be at Howland's Island on or before a given date. It may be that, if the ship had gone on some other voyage antecedently to her going to Howland's Island, that would have been, within the terms of the present policy, such a deviation as would have avoided the policy, so far, at all events, as relates to any disaster happening to the ship before her arrival at Howland's Island. But here the policy being upon freight to be earned by a voyage from Bombay to Howland's Island, and from Howland's Island to England, we may take it that the shipowner had in view the voyage which the vessel actually entered upon, and was intended to make, although he may have been at liberty, under the conditions of the charterparty, to go on some other voyage before. The destination of his ship was Howland's Island. It is plain that the plaintiff, on the facts of the case, never intended, on getting this policy made, to avail himself of the liberty which the charterparty left to him in that respect, but contemplated simply a voyage from Bombay to Howland's Island, and from Howland's Island, after taking in the cargo, to this country, and that is the voyage to which the policy is immediately applicable. Although the plaintiff was at liberty by the charterparty to go to other places, and if he had gone to other places it might possibly have been that this policy would thereby have been vitiated by reason of the deviation, I do not think that that argument can prevail, when we find that the policy is in terms applicable to such a voyage as actually was entered upon.

Mr. Milward also pointed out that, according to the terms of the policy, the risk would attach upon a cargo between Bombay and Howland's Island, that there was nothing to prevent the plaintiff

from carrying cargo from Bombay to Howland's Island, and the policy would attach just as much as upon the freight relating to the cargo to be carried from Howland's Island to England. This amounts to saying that the terms of the policy are large enough to embrace what was not in the contemplation of the parties, because it is clear that all that was intended by this policy was to secure the freight on the cargo to be carried from Howland's Island; but it is not necessary for us to consider what would have been the effect of the policy if it had been sought to apply it to freight between Bombay and Howland's Island. It may have been framed in larger terms than were necessary with reference to what was the real intention of the parties, but it does not follow from that that it is not quite sufficient as regards that which was really intended. I, therefore, do not think there is anything in that point.

But then it is said, and that brings us to the second part of the case, that, even assuming that this policy would be sufficiently operative to protect the assured in respect of loss of their freight by reason of the ship not being able to get to Howland's Island to take this cargo, yet he is not entitled to have the advantage of the insurance because it was his own fault that the vessel did not get to Howland's Island; in other words, that the failure to get to Howland's Island was not in consequence of the perils insured against, because the partial damage the vessel sustained could have been remedied. As has been thrown out in the course of the argument, this was a question eminently for the jury, and one which it does not appear that the parties submitted to my Brother Hannen as one he should withdraw from the jury, and refer to the Court; and it is quite clear my learned Brother had no such notion in his mind, and no such intention in reserving leave; and therefore, if there really were any question in the matter, I, for one, should protest against being called upon to decide it, and I should think it necessary to send the case for a new trial. But I must say, if we were called upon to decide upon the facts, it would be impossible for us to decide in favour of the defendant; and if we were to send the case for a new trial, the jury could only come to one conclusion upon the facts. The vessel is stranded and on shore at New Zealand; the captain is destitute of any means to repair

1869

BARBER v. FLEMING.

her. He applies to a person to advance money on bottomry. The money is advanced, not for the purpose of enabling the vessel to go and take a cargo from Howland's Island, but to take a timber cargo, which everybody knows requires a differently constituted vessel, to England. In the meanwhile notice is given to the underwriters on ship, by the owners, who declined themselves to do anything more in the way of repairing; and when the agent of the underwriters goes out and sees the state in which the vessel is, notwithstanding the repair which she has undergone, he says: "It is not worth while to repair this vessel and put her in such a state as that she shall be fit to go to Howland's Island and then to England, and you had better abandon her to the holder of the bottomry bond." On those facts, if a jury were called upon to determine whether there was a constructive total loss quoad this voyage to Howland's Island and thence to England, can any one hesitate in thinking a jury would find in the affirmative? Therefore, supposing it was a question for us to determine, we should determine it in favour of the plaintiff; and if we did not determine it ourselves, but left it to a jury, there could be but one result. I think, therefore, more especially as it was not a part of the reservation on which the rule was intended to be granted, that on this point our judgment should be for the plaintiff; and that upon the whole the rule should be discharged.

BLACKBURN, J. I am of the same opinion. I think, as soon as the case is understood, it is very clear. It appears there is a policy of insurance made upon a voyage "from Bombay to Howland's Island, and from thence to England." That is the description of the voyage. The nature of the thing insured is "freight chartered or otherwise." So that upon the face of the policy there is a bargain between the insured and the underwriters, by which if, during that voyage, by one of the perils insured against, freight is lost, the underwriters should pay. We have, therefore, to see whether there was freight lost during the voyage, which involves the question whether this chartered freight had come into existence at the time the accident happened which caused the alleged loss; whether, at that time, the interest had commenced. When there is an insurance upon freight, so long as the matter remains merely con-

tingent, so long as the shipowners have only a good hope of getting freight, no freight is in existence; and if the ship is lost, there would be no loss of freight, inasmuch as the freight had never come into existence, and all that the shipowners have lost is the hope of earning the freight. But, on the other hand, the law seems perfectly settled by a variety of cases, as I find it laid down by Mr. Phillips, in his book on Insurance, at § 328, where he says: "In regard to the commencement of this interest [in freight], it is a general rule that it commences, not only by the vessel sailing with the cargo on board, but also when the owner or hirer, having goods ready to ship, or a contract with another person for freight, has commenced the voyage, or incurred expenses and taken steps towards earning the freight." I think that is the accurate rule. When a shipowner has got a contract with another person under which he will earn freight, and has taken steps and incurred expense upon the voyage towards earning it, then his interest ceases to be a contingent thing, but becomes an inchoate interest, and is an interest which if afterwards destroyed by one of the perils insured against is lost, and ought to be paid for by the underwriters. Mr. Phillips a little further on, in § 335, states a proposition, which would seem exactly applicable to the present case, as I understand it. He says: "A vessel being chartered from A. to B., the interest in the freight commences under the charterparty on the vessel sailing for A., either in ballast or with a small quantity only of goods for B." And then he explains that proposition, "That is, if the prior passage is merely preliminary to the one for which the vessel is chartered, having no cargo deliverable at A. or any intermediate port, and the object in the passage to A. is merely to prosecute the voyage thence to B., the interest in the whole freight under the charterparty accrues on the commencement of the first passage." (1) He seems to be describing this

(1) Phillips cites the case of *Adams v. Warren Ins. Co.* (22 Pick. 163). The policy was dated the 18th of June, 1835, on the freight of the plaintiff's ship *Andes*, at and from New York to St. John's, East Florida, and thence to Charlestown, Massachusetts. The charter was, the 4th of June, 1835, of the whole of the vessel, and stipulated that she should proceed without delay from New York to the St. John's River, and there take on board a cargo of live oak timber, to be transported to Charlestown, freight to be payable on discharge. The underwriters were not aware of the existence of this charter until after the vessel was lost. The vessel sailed in ballast from New York on the 7th of

1869

BARBER v. FLEMING.

very case; when the owners have a charterparty from the Chincha Islands to England, the ship to start from Bombay to take in that cargo, the ship having started from Bombay upon the voyage, that is a sufficient commencement of the interest. He guards himself against saying, what it is as well to guard one's self against being supposed to say in the present case, that if the owners had been carrying freight from Bombay to Howland's Island that might not raise a different question. But the only question here is, whether or not the interest in freight had sufficiently commenced, when the shipowners began this voyage for the sole purpose of fulfilling the charterparty on which they would have earned freight, had they not been prevented by the accident. Mr. Fullarton, in his argument, admitted that he could not dispute that when the owners commenced the voyage, having the charterparty, the risk would have attached, provided the charterparty had been the ordinary charterparty that we meet with in general, in which, the ship being at Bombay, the shipowners would covenant that she should with all convenient speed proceed to the Chincha Islands, and there load a cargo. He admits that, if that had been so, the cases decide that as soon as the ship sails from Bombay to the Chincha Islands the interest in the chartered freight commences. But he says, in each of the cases cited, the party was bound to sail at once on the voyage, for the contract was that the ship should proceed to the port of loading with all convenient speed; and, consequently, he takes the distinction in the present case,—that it is not sufficient, that you are sailing in order to carry out the charterparty, but there must be a starting on the voyage because you are required and bound to do it by the charterparty; and consequently under this particular charterparty, where, instead of saying the

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June, 1835, for the purpose of fulfilling the charterparty, and had not since been heard of. The charterer had a cargo ready to be put on board at St. John's.

Shaw, C.J., delivering the judgment of the court, said: "It appears that the assured had a contract of charterparty to carry a cargo of live-oak from St. John's River, East Florida, to Charlestown, Massachusetts; that a cargo was there ready to be taken on board on the arrival of the vessel; and that the vessel sailed from New York in the execution of that contract, and was lost on the voyage. The assured had thus an inchoate right to freight, which was an insurable interest; it was lost by a peril insured against, and therefore the plaintiff has a right to recover."

1869

BARBER v. FLEMING.

ship at Bombay shall proceed at once to the Chincha Islands, the charterparty only requires that she shall be there by a particular day, the shipowner might make a seeking voyage on the way there; and that therefore he was not bound to go. But that is not within the spirit and reason of the rule. The spirit and reason of the rule are, that the interest commenced, not because the man acted under compulsion of the contract, but because he has acted so far under the contract as to shew it is so no longer speculative, but he had actually begun to do something which makes the inchoate interest attach, and makes it a real thing; and it seems to me that as soon as the ship, although not bound to go direct from Bombay to the Chincha Islands, had begun to sail there, the interest had sufficiently attached, and consequently on that point the plaintiff is right.

Then comes the other question, whether or not the freight was lost by the perils insured against. It appears, when the vessel was on the preliminary voyage, she met with the perils of the sea, and was stranded on the coast of New Zealand, and she was found to be in such a state that to repair her and send her to the Chincha Islands in a state to earn the freight would have cost more than she was worth. There was, besides the other evidence, the evidence of the agent of the underwriters on ship, who was sent out to look after their interest, and who thought she was not repairable, and desired she should not be repaired, and when in court was prepared to swear that that opinion was right.

There was, therefore, evidence to go to the jury upon that question, and I do not see, as far as I can make out, there was anything to the contrary. If, then, the defendant's counsel had meant to contest this question, it ought to have gone to the jury. What took place was that a verdict was entered for the plaintiff, reserving leave to move the Court on points mentioned, and, as far as I can learn, this particular one was not reserved, and then at the end of the reservation it was added, "the Court to draw inferences upon all points of fact." Are we to construe this as meaning that such a question was taken from the jury and to be referred to the Court? We could by no possibility decide any such point. Nor can it be supposed that the plaintiff's counsel would have consented to such a thing, nor that my Brother Hannen would have consented

1869

BARBER v. FLEMING.

to reserve such a question of fact for the Court. In point of fact the vessel never was repaired, and therefore the point that arose in *Benson* v. *Chapman* (1) does not arise here; but then in the attempts to repair there was a bargain made by the person who advanced the money that he must have the further security of a charter of the vessel for a cargo of timber; and it was argued that this shewed that the owners voluntarily abandoned the voyage. If that had been all that was shewn to make a total loss, it might be so, but if the fact was that the ship was not within the reach of the owners, and could not have been repaired so as to have gone to the Chincha Islands, this fresh charter did not prevent there being a total loss. I come, therefore, to the conclusion that the interest had really attached; and, secondly, that the loss was a total loss, assuming always what was admitted at the trial, that the injury was such that the vessel could not practically be repaired so as to earn this freight.

HANNEN, J. I am of the same opinion. It appears to me to be clear that this policy, to whatever else it may be applicable, included this particular freight which is the subject of this litigation. The policy may or may not apply to freight which might have been earned on the way from Bombay to Howland's Island. It may or may not apply to freight other than the chartered freight: but this particular freight is specified under the terms of the policy, inasmuch as it is chartered freight from Howland's Island to the United Kingdom. Now that being the only thing that is sought to be recovered, and if it be, as I think it is, within the terms of the policy, the only question that remains is, whether or not the thing which is the subject of insurance has been lost by the perils insured against; and that brings us to the consideration of whether or not this case comes within the rule which has been laid down in the cases that have been referred to, as to what is such a bringing into existence of the thing which is to be the subject of insurance as to make the liability of the underwriters attach. Now it seems to me that this case comes clearly within the rule as it is laid down in the passage referred to, by my Brother Blackburn from Phillips on Insurance, and also as it has been laid down in

(1) 2 H. L. C. 696; 8 C. B. 950.

1869

BARBER v. FLEMING.

the English authorities. I think the rule, as stated by Lord Ellenborough in *Davidson* v. *Willasey* (1) is applicable to this case. He is dealing with a policy on the freight upon a voyage that is to consist of two parts, and he says: "The interest intended to be insured was the freight which the assured would have earned under the terms of the charterparty, if the voyage had not been stopped by the perils insured against." Now apply that here; if the voyage, in the course of which the freight was to be earned, treating it only as a voyage from Howland's Island to the United Kingdom, could have been carried out, then the loss would not have been sustained. How was it prevented being carried out? For the purpose of this part of the case it must be taken that it was prevented from being carried out by the fact that by the perils of the sea it became impossible for the vessel to prosecute that voyage.

But it has been contended upon the facts that that is not so, and that the vessel was not prevented from prosecuting the voyage contemplated by the charter by perils insured against, but by the free will of the representative of the owners, that is the captain, in accepting another charterparty. On this I have only to say, that no such point was ever presented to my mind at the trial, and that if it had been presented to my mind I should have thought myself greatly departing from my duty, if I had left any such question as that to the Court; because that would have involved an inquiry into the physical condition of the ship when in New Zealand, a question which it is manifest the Court is not in a position to form any opinion upon. But, as it seemed to me, that question was not originally intended to be raised. It seemed only to arise incidentally in a second cross-examination by Mr. Milward; and it appeared to me to be altogether dropped, when the answers which were given appeared, and were, in effect, conclusive upon the subject. I cannot think that Mr. Milward would not have pressed that question further and insisted upon its being left to the jury, if he had not at the time, although he has forgotten it now, thought it useless to present any such question to the jury, after the evidence of the witness who represented the underwriters upon the ship.

(1) 1 M. & S. 313, 316.

1869

BARBER v. FLEMING.

For these reasons I concur with my Lord and my Brother Blackburn.

HAYES, J., fully concurred, for the reasons given by the rest of the Court.

Rule discharged.

Attorney for plaintiff: *Southgate.*

Attorneys for defendants: *Cotterill & Sons.*

Nov. 15.

OAKE AND ANOTHER *v.* MOORECROFT.

Practice—Appearance to Writ by Defendant in Person—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *ss.* 30, 31.

The appearance of a defendant in person to a writ of summons under the Common Law Procedure Act, 1852, ss. 30, 31, need not be by the own proper person of the defendant, and the memorandum required by s. 31 may be delivered to the officer by a third person duly authorized in the defendant's behalf.

THE writ in this action was issued on the 4th of October, 1869, under the Bills of Exchange Act (18 & 19 Vict. c. 67), on a bill accepted by the defendant; the plaintiffs being unable to effect personal service, a copy was left with a servant of the defendant on the 21st of October, and this was handed by the defendant to one Edward Perry, who was described in his affidavit as late an attorney's clerk. Perry prepared an affidavit, and on the 1st of November obtained an order for leave for the defendant to appear. On the 3rd of November, the plaintiffs, not being aware that the defendant had obtained leave to appear, obtained the usual order for leave to proceed in three days as if personal service had been effected; and this order was served on the same day on the defendant. The time for entering an appearance expired on Saturday, the 6th of November, and on Monday morning, the 8th of November, Perry, as he swore positively, immediately on the opening of the office, handed in the usual memorandum of the appearance of the defendant *in person*, with the defendant's address, as required by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 30, 31. (1) The plaintiffs signed judgment the same morning,

(1) By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 30, "every appearance by the defendant in person shall give an address, at which

1869

OAKE v. MOORECROFT.

but several judgments were signed previously; a ca. sa. was immediately taken out and the defendant arrested on the same day.

Application was made on behalf of the defendant, to Lush, J., at chambers, but he refused to interfere, being of opinion that the appearance entered by a third person was not a good appearance of the defendant in person.

A rule was then obtained, on affidavits shewing the above facts, calling upon the plaintiffs to shew cause why the judgment should not be set aside and the defendant discharged out of custody of the sheriffs of London, on the ground that the judgment was signed after appearance entered.

Day shewed cause. The practice has always been, that an appearance of a defendant in person must be by the defendant himself; and the requisites under the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 29—31, have not altered this practice. The only two modes by which an appearance can be entered are by an attorney of the court, or in person. If an attorney's clerk may act as in the present case, it will open the door wide for unlicensed practitioners.

Lumley Smith, in support of the rule. The appearance at the most is irregular, and therefore until set aside the judgment could not be entered. But there is no necessity that the defendant should attend personally for the purpose of entering an appearance; suppose the defendant to be bedridden, or at a great distance

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it shall be sufficient to leave all pleadings and other proceedings not requiring personal service; and if such address be not given, the appearance shall not be received; and if an address so given shall be illusory or fictitious, the appearance shall be irregular, and may be set aside by the Court or a judge, and the plaintiff may be permitted to proceed by sticking up the proceedings in the Master's office without further service."

s. 31. "The mode of appearance to every such writ of summons, or under the authority of this Act, shall be by delivering a memorandum in writing, according to the following form, or to the like effect:—

'A. B., plaintiff, against C. D., or against C. D. and another, or against C. D. and others.	The defendant C. D. appears in person. E. F., attorney for C. D., appears for him.

[*If the defendant appears in person, here give his address.*]

Entered the day of 18 .'

Such memorandum to be delivered to the proper officer or person in that behalf, and to be dated on the day of the delivery thereof."

1869

OAKE v. MOORECROFT.

from London, is he not to be able in the one case to enter an appearance at all, or in the other only at an immense expense? The fact that the appearance was entered by an ex-clerk to an attorney must be excluded in the consideration of a general point of practice.

COCKBURN, C.J. I am of opinion this rule should be made absolute. Whatever may originally have been the reasons of compelling a defendant to answer according to the exigency of the writ in person, they have now passed away. Now, in entering an appearance in person, all that is required is that a memorandum be handed in, stating that the defendant appears in person, and giving his address; and this address is only required in order that the plaintiff may know where to leave subsequent proceedings and documents in the cause; and it seems to me, that to require that this must be done by the defendant himself, would be to impose on defendants a great amount of inconvenience without any reason. It is true that it is just possible that a third person may officiously or even fraudulently enter an appearance on behalf of the defendant; but such cases must be rare, and the Court would know how to deal with them. Since, therefore, on the one hand a great amount of inconvenience would be imposed on a defendant living at a distance or prevented by some good cause from attending, while, on the other hand, by allowing the defendant to make the entry by proxy all material advantages are attained by requiring the memorandum to contain the defendant's true address, I think we should be but acting in accordance with the modern system of practice by holding, that an appearance by the defendant in person may be entered by some other person duly authorized. Therefore, as it is clear that the appearance in this case was entered before judgment was signed, the rule must be absolute to set the judgment aside. But inasmuch as the defendant allowed three days to pass without giving any notice to the plaintiffs that he had obtained leave to appear, and then entered his appearance also without giving notice, the rule can only be absolute without costs, and of course on the condition that the defendant bring no action against the sheriffs.

BLACKBURN, J. I quite agree that though the old practice

appears to have been that an appearance, if not by attorney, must be personally or by the defendant himself, yet it would be a more convenient practice if we held that the appearance need not be entered by the defendant in his own proper person. If unqualified persons take advantage of this decision, and in effect act as attorneys, proceedings can be taken against them.

HANNEN, J. I am of the same opinion. Under the old practice, if the defendant was unable to appear in person he had a remedy in certain cases, for he could send essoiners to excuse his non-appearance, but the modern law has swept all that away. The appearance is now made by the delivery of a memorandum to the proper officer, and I think that by holding that this delivery may be by the hand of an agent, we shall be deciding and making the practice quite in conformity with the language of the statute.

Rule absolute accordingly.

Attorneys for plaintiffs: *Tucker, New, & Langdale.*
Attorney for defendant: *W. T. Boydell.*

THE POOR LAW COMMISSIONERS OF IRELAND, APPELLANTS; THE SELECT VESTRY OF THE PARISH OF LIVERPOOL, RESPONDENTS. *Dec.* 13.

Poor—Removal—Irish Pauper—Removal of Wife without Husband—8 & 9 Vict. c. 117, s. 2.

Application was made to justices for the removal of a married woman and her two children from the parish of L., where they had become chargeable, to her birthplace in Ireland. The husband was also Irish, and neither of them had acquired any settlement in England; the children were the issue of the marriage, were unemancipated, and were also born in Ireland. The wife and children had been deserted by the husband; and it was not known where he was living:—

Held, that the wife and children could not be removed to Ireland under 8 & 9 Vict. c. 117, s. 2, without the husband, who was the head of the family.

CASE stated by consent under 12 & 13 Vict. c. 45, on appeal against an order of removal.

At a petty session for the borough of Liverpool a warrant, dated the 28th of May, 1868, which recited, amongst other things, that Ellen Keating was born at Tullamore, in Ireland, was granted by two justices, for the removal of Ellen Keating and her two

1869

POOR LAW COMMISSIONERS OF IRELAND v. VESTRY OF LIVERPOOL.

children, Margaret aged thirteen, and John two years, from Liverpool to the union of Tullamore.

The form of the warrant was that given in the schedule to 26 & 27 Vict. c. 89, form 1. The statutes under which the warrant was obtained were 8 & 9 Vict. c. 117, as amended by 10 & 11 Vict. c. 33, 24 & 25 Vict. c. 76, and 26 & 27 Vict. c. 89. (1)

(1) 8 & 9 Vict. c. 117, s. 2:—"That if any person born in Ireland . . . not settled in England, become chargeable to any parish in England by reason of relief given to himself or herself, or to his wife, or to any legitimate or bastard child, such person, his wife, and any child so chargeable, shall be liable to be removed to Ireland . . . and if the guardians of such parish, or of any union in which the same may be comprised, or, where there are no such guardians, of the overseers of such parish, complain thereof to any one justice of the peace, such justice may, if such person do not attend voluntarily, summon him to come before any two justices of the peace at any time and place to be named in the summons; and at such time and place, or on the attendance of such person, any two justices may hear and examine into the matter of such complaint, and if it be made to appear to their satisfaction that such person is liable to be so removed as aforesaid, and if they see fit, they may make and issue a warrant under their hands and seals to remove such person forthwith at the expense of such union or parish."

24 & 25 Vict. c. 76, s. 2:—"Such warrant of removal shall be granted only on the application of the relieving officer or other officer of the guardians of the union or parish where such poor person shall become chargeable, and shall contain the name and reputed age of every person ordered to be removed by virtue of the same, and the name of the place in Ireland where the justices or magistrate shall find such persons to have been born or to have last resided for the space of three years, and a statement of such examination having been made as to the state of health of every person ordered to be removed as aforesaid; and such warrant shall be addressed to the party applying for the same, and to the guardians of the union or parish to which such poor person is to be removed, and a copy shall be given by and at the cost of the person applying for such warrant to the person or the head of the family about to be removed by virtue of it."

10 & 11 Vict. c. 33, s. 1, made it lawful for any overseer of any parish in England to convey before two justices of the peace without summons or warrant any pauper who he may have reason to believe is liable to be removed from England under 8 & 9 Vict. c. 117.

26 & 27 Vict. c. 89, s. 7:—"If the board of guardians of any union in Ireland think themselves aggrieved by the removal of any poor person, and if they forward to the Poor Law Commissioners for Ireland a statement of the grounds for concluding that such poor person is legally settled in any parish or township in England, and was not in law liable to be removed to Ireland, and if such board of guardians, or any person on their behalf, shall agree to pay all costs which may be incurred in any necessary preliminary inquiry, and in the appeal against the warrant for the removal of such poor person, such commissioners, if satisfied that it will be expedient to do so, may appoint some

1869

POOR LAW COMMISSIONERS OF IRELAND *v.* VESTRY OF LIVERPOOL.

Ellen Keating is the wife of John Keating, and Margaret and John mentioned in the warrant of removal are their legitimate and unemancipated children.

On the 30th of September, 1867, Ellen Keating and her two children were admitted into the Liverpool workhouse as the wife and children, and known by the respondents to be the wife and children, of John Keating, and remained there until removal to Tullamore Union, Ireland, by warrant dated the 28th of May, 1868.

John Keating, the husband, was born in Ireland, but not within

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person to make a preliminary inquiry into the circumstances attending such removal, and after such inquiry may, if they think fit, appeal on behalf of the guardians so aggrieved to the court of quarter sessions held for the county or borough within which the parish or township from which such removal was made is situate, at any time within six months after such removal was completed; and such commissioners shall, at least twenty-one days before the holding of such sessions, send by post to the guardians or overseers on whose application such warrant was obtained notice in writing purporting to be signed by their secretary or chief clerk of their intention to appeal against such warrant, containing a statement in writing of the grounds of such appeal, and such court of quarter sessions shall hear and determine such appeal; and if the warrant of removal be reversed or declared illegal by such court, the guardians or overseers on whose application the same was obtained shall pay the costs and expenses incurred by or on account of such board of guardians, both for the preliminary inquiry and the appeal, and for the maintenance of such poor person, and for conveying such person back to the parish or township in England from which the removal was made; and if such guardians or overseers neglect or refuse to pay such costs and expenses within seven days after demand thereof, the guardians on whose behalf such appeal was made, or any person authorized by them, may recover the same as a debt in a court of law in England: Provided always, that the said guardians or overseers may, at any time after such notice of appeal, send by post notice in writing under the hands of any two or more of them to the said commissioners that they abandon such warrant, and thereupon such warrant shall be of no effect; and such guardians or overseers shall pay to the guardians on whose behalf such notice of appeal was given, or to some person authorized by them, the expenses incurred by them, or on their account, by reason of such warrant, and of the preliminary inquiry, and of any proceedings consequent thereon, and the actual expenses and charges of maintaining such poor person, and of conveying such poor person back to such parish or township, and if they do not pay the same within seven days after demand the same may be recovered as a debt in a court of law in England: Provided also, that if on the hearing of the appeal, judgment shall be given against the appellants, the respondents shall be entitled to recover the costs which they have incurred in and about the appeal from such appellants."

1869

POOR LAW COMMISSIONERS OF IRELAND v. VESTRY OF LIVERPOOL.

the district of the Union of Tullamore, nor had he ever resided for three years within the district of that union. Ellen Keating was born within the district of Tullamore Union, and both of the children, Margaret and John, were born in Ireland.

On the 17th of September, 1868, John Keating was convicted of deserting his wife and children.

The warrant of removal was issued in the absence of John Keating, and without any summons having been issued requiring his attendance before the justices who granted it.

At the time of granting the warrant of removal, and until his apprehension and conviction, John Keating was living and residing at Hull, and not in the parish of Liverpool, but the respondents did not know at the time the warrant was made where John Keating was to be found. It did not appear from the examinations, or in any other way, that any inquiry had been made as to John Keating.

The questions for the Court were, whether the warrant of removal under the above facts should have been granted by the justices, and if so, whether it was rightly granted for removal to the Union of Tullamore.

Nov. 6. *Francis*, for the respondents. The question is, whether a married woman and her legitimate unemancipated children, all born in Ireland, the woman having been deserted by her husband, and neither husband nor wife having any settlement in England, can be removed to her maiden settlement in Ireland. In *Rex* v. *Cottingham* (1), a woman married to an Irishman, who had no settlement in England and had deserted her, was held to be removeable to her maiden settlement in England, and this affords a strong analogy to the present case. If she were not a married woman, it is clear that the warrant of removal would be good; the doubt arises from her coverture: but here, the wife being deserted, her maiden settlement revives, and under 8 & 9 Vict. c. 117, s. 2, and the statutes amending it, she was rightly removed to her maiden settlement in Ireland.

Mellish, Q.C. (*Leofric Temple* with him), for the appellants. During marriage, a wife's settlement is suspended; and it is quite

(1) 7 B. & C. 615.

true that if the husband has no settlement, on his death or desertion her maiden settlement revives. But the question here arises on s. 2 of 8 & 9 Vict. c. 117; and under that section she cannot be removed to Ireland, except as part of her husband's family. The words are, "if any person born in Ireland . . . become chargeable to any parish in England by reason of relief given to himself or his wife, or any legitimate child, *such person, his wife, and any child* so chargeable may be removed to Ireland;" that clearly contemplates that the whole family shall be removed together. The husband becomes chargeable by reason of relief given to the wife and children (4 & 5 Wm. 4, c. 76, s. 56), and he must be removed with them. The order, which does not include the husband, who is the head of the family, is therefore bad. Here the wife and children are not chargeable, by reason of relief given to them; it is the husband who is chargeable.

Francis, in reply. The wife having been deserted, and the children being unemancipated, she becomes the head of the family; the children would follow her settlement. *Rex* v. *Cottingham* (1) is followed in *Reg.* v. *Much Hoole.* (2) Here, neither wife nor children have a settlement in England, and this distinguishes the case from *Reg.* v. *All Saints, Derby.* (3)

Cur. adv. vult.

Dec. 13. The judgment of the Court (Cockburn, C.J., Lush and Hannen, JJ.) was delivered by

COCKBURN, C.J. This was a case stated by consent under the statute 12 & 13 Vict. c. 45 upon an appeal against an order or warrant made by two justices of the peace for the borough of Liverpool, on the 21st of May, 1868, for the removal of Ellen Keating and her two children from the parish of Liverpool, where they had become chargeable, to the Union of Tullamore in Ireland, the birthplace of the said Ellen Keating. The pauper, Ellen Keating, was the wife of John Keating, who was an Irishman; neither of them had acquired any settlement in England, the children were the issue of the marriage, and were born in Ireland; they were infants and unemancipated, one being aged thirteen and the other

(1) 7 B. & C. 615. (2) 17 Q. B. 548; 21 L. J. (M.C.) 1.
(3) 14 Q. B. 207; 19 L. J. (M.C.) 14.

1869

POOR LAW COMMISSIONERS OF IRELAND v. VESTRY OF LIVERPOOL.

two years. At the time when Ellen Keating and the children became chargeable, and also at the time of the making of the warrant of removal and of executing it, John Keating was not living in the parish of Liverpool; he had some time previously deserted his wife, and was living at Hull in Yorkshire; but the respondents did not then know where he was, or where he could be found. He was consequently not summoned, or brought before the removing magistrates, nor does it appear from the examination, warrant of removal, or any statement in the case, that inquiry was made as to him or as to his place of birth. In point of fact, he was not born in Tullamore, nor had he resided there for three years.

Under these circumstances it was contended on behalf of the appellants that the warrant of removal of the wife and the two children to Tullamore, the place of the wife's birth, was invalid, and ought not to have been granted; and we are of that opinion.

The statute under which the removal of Irish paupers is now regulated is the 8 & 9 Vict. c. 117; as amended by the 10 & 11 Vict. c. 33, the 24 & 25 Vict. c. 76, and the 26 & 27 Vict. c. 89. The material clause is the 2nd section of the first-mentioned statute. The language of the section, according to its plain natural meaning, appears to require that, where there is a husband as well as a wife and children liable to be removed, they are all to be removed together. With regard to the place to which the removal is to be made, by the 4th section of the 8 & 9 Vict. c. 117, the justices of a county or borough were empowered to make regulations for the removal of "such poor persons, their wives and children." But this section is now repealed; and by statute 24 & 25 Vict. c. 76, s. 2, the warrant of removal was required to contain (amongst other things) the name of the place in Ireland where the removing justices shall find such poor person to have been born or to have last resided for three years, and a copy of the warrant was thereby required to be given to the person or "the head of the family" about to be removed by virtue of it. This shews that the legislature intended that where there was a head of the family the removal was to be to his or her place of birth, or place of residence. And the 26 & 27 Vict. c. 89, which makes further regulations concerning these removals, and gives the right of appeal by the Poor

Law Commissioners of Ireland, prescribes the particular form of warrant used in this case.

No provision is made in any of these Acts, or in any of the former statutes which were repealed by the 1st section of the 8 & 9 Vict. c. 117, where a woman has been deserted by her husband, for her being removed without him, or being removed to any other place than the husband's settlement if he were living. And upon a review of the statutes and the decisions upon them, we think that such a case is left unprovided for.

In *Rex* v. *Cottingham* (1), which case arose on the construction of a former Act, the 59 Geo. 3, c. 12, which is now repealed, but which in its enactments closely resembled the 8 & 9 Vict. c. 117, s. 2, it was held, that the wife of an Irishman, who had no settlement in England and had deserted her, might be removed without him to her own maiden settlement, which revived on her desertion by her husband. But it was there laid down by Bayley, J., in delivering the judgment of the Court, that the statute of the 59 Geo. 3, c. 12, s. 83, which in this respect is undistinguishable from the present, did not authorize the removal of the wife alone to the place of birth of her husband; and that, as the husband, having quitted the parish, could not be removed to Ireland, so the wife could not be removed there without him; and that the case was therefore not within the Act. It had been previously held in the case of *Rex* v. *Leeds* (2), that the wife and unemancipated children of a Scotchman, who had not deserted his wife but was living with her, could not, even with his consent, be removed to her maiden settlement, but that all were removeable with the husband to Scotland. In *Reg.* v. *All Saints, Derby* (3), the question of the construction of the present Act arose in the case of the children of an Irish father by an Irish mother. The mother had died, and the children had been deserted by the father. It was there decided that they were removeable to the parish of their birth in England, and not to Ireland, under the 2nd section of the statute. Coleridge, J., there laid down that according to the Act, the father must be dealt with as the subject of removal. And Wightman, J., said that the statute, for the purpose of removal "applied directly

(1) 7 B. & C. 615. (2) 4 B. & A. 498.
(3) 14 Q. B. 207; 19 L. J. (M.C.) 14.

1869

Poor Law Commissioners of Ireland v. Vestry of Liverpool.

to the father only, and to the children not otherwise than incidentally as a part of his family; and that if the father cannot be removed there is no power over the child." Coleridge, J., also observed that the section might mean that, if the father were summoned, the order might be made at the time and place named, whether he appeared or not, or at any time when he did come, and that if he were absent, service of the summons upon him must be shewn, so that at all events the proceeding should relate to him. This case, which recognized the previous case of *Rex* v. *Cottingham* (1), appears to make it clear that the wife and children cannot be removed except with the father, and at all events as part of the father's family, and in a proceeding having reference to him; and therefore a warrant of removal which ignores the father and the father's place of birth, and removes to that of the mother, must be considered as unwarranted by the statute.

The subsequent cases of *Reg.* v. *Much Hoole* (2), and *Reg.* v. *St. Giles, Cripplegate* (3), are substantially in accordance with the cases previously mentioned, as shewing that neither a wife deserted by her husband, an Irishman, nor a daughter, though unemancipated and becoming chargeable in a different parish from that in which her parents who were Irish without a settlement resided, can be removed to Ireland under the statute now in question. And as we have had no instance brought to our notice of such a removal having been made, and have been unable to discover any such case, we consider that this order of removal ought to be reversed as illegal, and that the respondents should, according to the 7th section of the 26 & 27 Vict. c. 89, pay the expenses of the preliminary inquiry and appeal, and also those of maintaining the persons removed, and of conveying them back to Liverpool.

Judgment for the appellants. (4)

Attorneys for appellants: *Field & Roscoe.*

Attorneys for respondents: *Monckton & Monckton.*

(1) 7 B. & C. 615.

(2) 17 Q. B. 548; 21 L. J. (M.C.) 1.

(3) 17 Q. B. 636; 21 L. J. (M.C.) 26.

(4) At the conclusion of the judgment Cockburn, C.J., added, "I can deliver this judgment only as that of my Brothers Lush and Hannen and myself, but I may state that unanimity of opinion existed amongst the members of the Court, for the judgment was prepared by my late Brother Hayes."

THE QUEEN, ON THE PROSECUTION OF E. EAGER, *v.* THE JUSTICES OF SURREY.

1869
Nov. 25.

Highway—Order that Parish shall cease to be liable to Repair Highway—Certificate of Justices—Appeal—Highway Act, 1835 (5 & 6 *Wm.* 4, *c.* 50), *ss.* 84, 85, 88, 91—*Highway Act*, 1864 (27 & 28 *Vict. c.* 101), *s.* 21—*Construction—"Like proceedings."*

The Highway Act, 1835, s. 84, enacts, that when the inhabitants in vestry shall deem it expedient that any highway should be stopped up, application may be made to two justices to view the same. By s. 85, when it shall appear upon such view that such highway is unnecessary, the justices, after the giving of certain notices, &c., shall proceed to certify the fact of their having viewed the highway, and the certificate shall state that the highway is unnecessary, and shall be lodged with the clerk of the peace for the county, and enrolled amongst the records of the court of quarter sessions. By s. 88, when any such certificate shall have been given, any person who may think that he would be injured if such highway should be stopped up, may make complaint thereof by appeal to the quarter sessions. By s. 91, if no appeal is made, or if one is made and dismissed, the quarter sessions shall make an order to stop up such highway; and the proceedings thereupon shall be binding and conclusive upon all persons.

By s. 21 of the Highway Act, 1864, when any highway board consider any highway unnecessary for public use, they may apply to two justices to view the same, "and thereupon the like proceedings shall be had as when application is made under the Highway Act, 1835, to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly; and for the purpose of such proceedings under this enactment such variation shall be made in any notice, certificate, or other matter preliminary to the making of such order, as the nature of the case may require:"—

Held, that the words "like proceedings" in s. 21 of the Highway Act, 1864, include all the proceedings contained in s. 85 of the Highway Act, 1835, for the purpose of procuring the stopping up of a highway, and also those proceedings designated by the general name of appeal to quarter sessions, given by s. 88 of the same Act.

RULE, calling on the Justices of Surrey to shew cause why a writ of mandamus should not issue to them to hear and determine appeals against four certificates of justices, for the purpose of causing certain highways to cease to be highways which the parish in which they are situate is liable to repair.

By the Highway Act, 1835 (5 & 6 Wm. 4, c. 50), ss. 85—91, highways may in certain cases be stopped up, on a certificate of two justices and an order of the quarter sessions; s. 88 gives a

1869

THE QUEEN v. JUSTICES OF SURREY.

right of appeal to quarter sessions to persons who may think that they would be aggrieved by such stopping up of a highway. The Highway Act, 1864 (27 & 28 Vict. c. 101), s. 21, provides that highways shall no longer be stopped up under the Highway Act, 1835, but instead of being stopped up they shall cease to be highways which the parish is liable to repair, and that "the like proceedings shall be had," under the Act of 1864, to relieve a parish of liability to repair a highway, as where a highway is stopped up under the Act of 1835.

The question was, whether the words "like proceedings" in s. 21 of the Highway Act, 1864, included the right of appeal given by s. 88 of the Act of 1835. (1)

(1) The Highway Act, 1835 (5 & 6 Wm. 4, c. 80), s. 84, enacts:—When the inhabitants in vestry assembled shall deem it expedient that any highway should be stopped up, diverted, &c., the surveyor may be directed to apply to two justices to view the same.

s. 85:—"When it shall appear upon such view of such two justices . . . that any public highway is unnecessary, the said justices shall direct the surveyor" to affix a notice, as therein specified, at each end of the highway which is to be stopped up, and to insert a similar notice in some newspaper, and to affix another similar notice on certain church doors, and after such notices have been published, and proof thereof has been given to the satisfaction of the justices, and a plan of the highway to be stopped up delivered to the justices," the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid . . . and the certificate shall state the reason why the said highway is unnecessary; and the said certificate . . . together with the proof and plan . . . shall, as soon as conveniently may be after the making of the said certificate, be lodged with the clerk of the peace for the county in which the said highway is situated, and shall, at the quarter sessions, . . . be read . . . in open court; and the said certificate, together with the proof and plan . . . shall be enrolled . . . amongst the records of the said court of quarter sessions; provided always that any person whatever shall be at liberty at any time previous to the said quarter sessions, to inspect the said certificate and plan . . . and to have a copy thereof." . . .

s. 88:—"When any such certificate shall have been so given as aforesaid, it shall be lawful for any person who may think that he would be injured or aggrieved if any such highway . . . should be ordered to be stopped up to make his complaint thereof by appeal to the quarter sessions."

s. 89:—"In case of such appeal, the justices at the quarter sessions shall, for the purpose of determining whether the highway intended to be stopped up is unnecessary, or whether the party appealing would be injured or aggrieved, impannel a jury." If the highway is unnecessary, or the party appealing would not be injured, then the quarter sessions shall dismiss such appeal, and make the order therein mentioned for stopping up such highway; but if the highway is not unnecessary, or the party

1869

THE QUEEN v. JUSTICES OF SURREY.

Robinson, Serjt., and *Thesiger*, shewed cause. (1) There is no right to appeal against proceedings under s. 21 of the Highway Act, 1864. An appeal, unlike a certiorari, does not exist of common right, and can therefore only be given by the clearly expressed intention of the legislature: *Rex* v. *The Justices of Surrey* (2); *Rex* v. *Hanson* (3); *Reg.* v. *Stock.* (4) No such intention appears in s. 21. The words "like proceedings" are ambiguous. They may or they may not include a right of appeal. If the whole statute of 1864 is examined, it seems reasonable that the former right of appeal should not exist in proceedings under s. 21. The persons who, under the Act of 1835, set in motion the justices who view the highway, were the inhabitants. Under the Act of 1864 it is the Highway Board. (5) It may well be that it was intended that

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appealing would be injured, then the quarter sessions shall allow such appeal, and shall not make such order.

s. 90 provides for the costs of appeals.

s. 91:—"If no such appeal is made, or being made shall be dismissed as aforesaid, then the justices at the quarter sessions shall make an order . . . to stop up such unnecessary highway . . . and the proceedings thereupon shall be binding and conclusive on all persons whatsoever."

s. 21 of the Highway Act, 1864 (27 & 28 Vict. c. 101), enacts:—"When any highway board consider any highway unnecessary for public use, they may direct the district surveyor to apply to two justices to view the same, and thereupon the like proceedings shall be had as where application is made under the Highway Act, 1835, to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly; and for the purpose of such proceedings under this enactment, such variation shall be made in any notice, certificate, or other matter preliminary to the making of such order, as the nature of the case may require; provided that if at any time thereafter upon application of any person interested in the maintenance of such highway . . . it appear to any court of general or quarter sessions that from any change of circumstances since the time of the making of any such order as aforesaid, under which the liability of the parish to repair such highway has ceased, the same has become of public use, and ought to be kept in repair by the parish, they may direct that the liability of the parish to repair the same shall revive from and after such day as they may name in their order, and such liability shall revive accordingly, as if the first-mentioned order had not been made. . . ."

(1) In the Bail Court, before Hannen, J.

(2) 2 T. R. 504.

(3) 4 B. & A. 519.

(4) 8 Ad. & E. 405.

(5) See ss. 9—11 of the Highway Act, 1862 (25 & 26 Vict. c. 61), which is incorporated with the Highway Act, 1864: see next note.

1869

THE QUEEN v. JUSTICES OF SURREY.

the Highway Board should have greater powers than were given to the inhabitants by the Act of 1835. So also the order under s. 21 of the Act of 1864 is different from, and less important in its effects than, an order under the Act of 1835. Under s. 21 the order only directs that the highway shall cease to be a highway which the parish is liable to repair, and not as under the Act of 1835 that the highway shall be stopped up. Moreover, the latter part of s. 21 provides that a parish may again become liable to repair a highway after having ceased to be liable to do so. This liability may be reimposed upon a parish by application to the quarter sessions. This shews that proceedings before the quarter sessions were not forgotten when s. 21 was drawn. So, also, by s. 38 of the Act of 1864, an appeal is expressly given in certain cases. When an appeal is expressly given in one place, it is probable that it would have been given in the same manner in any other part of the same statute where it was intended that there should be an appeal. The words "like proceedings" therefore apply only to the proceedings for stopping up the highway under s. 85 of the Act of 1835, and not to proceedings to prevent such stopping up under s. 88.

Garth, Q.C., and *Gates*, in support of the rule. It is clear that the legislature intended that there should be an appeal under s. 21. The Highway Acts of 1835, 1862, and 1864, are incorporated together, and are to be read as one Act. (1) Therefore, the appeal given by s. 88 of the Act of 1835 is incorporated with the Act of 1864. The words "like proceedings" are large enough to include the proceedings on appeal, and it is therefore reasonable to suppose that they were intended to include such proceedings. There is no reason for thinking that the legislature intended that the decision of the Highway Board should be final and without appeal. There is nothing in the Acts of 1862 or 1864 to that effect. Although an order under s. 21 does not stop up a highway, yet by relieving the parish from liability to repair it, the highway may become impassable, and so in effect be stopped up. When the whole machinery provided by the Act of 1835 for stopping up a highway is examined, it is clear that what is called an appeal is not

(1) s. 42 of the Highway Act, 1862 (25 & 26 Vict. c. 61), and s. 2 of the Highway Act, 1864 (27 & 28 Vict. c. 101).

really an appeal, but a mode by which persons aggrieved may prevent the making of an order by the quarter sessions for the stopping up of a highway. The certificate of the justices has no operation except to give the quarter sessions jurisdiction to make an order. The justices have no power to hear any one against their certificate. What is called an appeal is an opposition, and the only means of opposition to the making of the order by the quarter sessions. To hold that this right of appeal does not exist, would be to alter the whole character of the proceedings, and not merely to prevent an appeal from proceedings complete in themselves. The latter part of s. 21 mentions proceedings before the quarter sessions, because it creates a new procedure adapted to new rights. The appeal is not mentioned in the earlier part of the section, because it is so obvious that it is included in the words "like proceedings." Section 38 of the Act of 1864 gives an appeal expressly, because there would have been no right of appeal at all in cases within that section without an enactment to that effect, and that appeal is confined to the matters specified in the section.

HANNEN, J. I am of opinion that an appeal will lie in this case. I think, therefore, that this rule must be made absolute for a mandamus to the justices of Surrey to hear these appeals. I agree with Mr. Thesiger that an appeal can only be given by the clearly expressed intention of the legislature. This must be ascertained by an examination of the whole of the enactment which is the subject of inquiry. It is not necessary that there should be any particular form of words, but it is essential that an intention to give an appeal should clearly appear.

The question in this case arises upon s. 21 of the Highway Act, 1864, and the words of the section, which are relied on as giving an appeal, are as follows:—[The learned Judge read the first part of the section.] It is argued that the words "like proceedings" include all proceedings contained in s. 85 of the Highway Act, 1835, for the purpose of procuring the stopping up of a highway, and also include those proceedings designated by the general name of appeal to quarter sessions given by s. 88 of the Highway Act, 1835. I think this contention is well founded. The sentence in s. 21 next following that in which is contained the words "like proceed-

1869

THE QUEEN v. JUSTICES OF SURREY.

ings" points out the change that is to be made in the order, viz., that the order "instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair." Now, the order which would formerly have been effective for stopping up a highway is an order which would be made by the quarter sessions under s. 91, and the provisions and proceedings which are provided for by s. 85 for the purpose of stopping up a highway are all proceedings which lead up to an order to be made in quarter sessions.

If we look at ss. 86 and 87 of the Act of 1835 we find the word "order" loosely used in conjunction with "certificate;" yet when the meaning of s. 85 is examined, we see that there is no order by the two justices but only a certificate with a view to found the jurisdiction of the quarter sessions to make an order. This is clear from the peculiar way in which the rights of parties interested are to be protected. There is an elaborate machinery provided, and notices of the alteration of the highway are to be given for the purpose of affording information to the persons likely to be injured by the change. Yet s. 85 provides no means for enabling those persons to be heard before the justices who give the certificate, but it only seems to contemplate the fact that they shall have notice that the justices having been put in motion are about to give a certificate which is a condition essential to the order, and that when the certificate is given the remedy of any person aggrieved is by taking these proceedings which are called an appeal to the quarter sessions. There is no operative order until the order of quarter sessions is made under s. 91. Therefore, I think the words "like proceedings," &c., must have been intended by the legislature to include all proceedings up to the time of the making of the order of quarter sessions.

This seems reasonable, as I cannot see why a person affected by a change in the liability to repair a highway, should be in a worse position than those who are affected by the stopping up or changing a highway, as if a carriage-way is altered into a bridle-way; any such change might be disadvantageous to the persons accustomed to use the way, and there is no reason why there should not be the same right of appeal in either case. I further find that there is an express provision in the latter part of s. 21, that any person interested in the maintenance of the

highway may, after the making of an order under that section, apply to the quarter sessions that the liability of the parish may be revived. If the power of appeal to the quarter sessions does not exist on the original investigation, there is this singular anomaly, that a person affected by the original order would be conclusively bound by the certificate of the justices who viewed the highway without any means of calling in question the certificate, yet the same person is entitled to go to the quarter sessions and get a change made in the order. I see no reason for such an anomaly, and it would be avoided by holding that s. 21 includes in the words "like proceedings" all the proceedings up to the final order by the quarter sessions.

The other sections which have been referred to require no further comment except s. 38, which undoubtedly deals with the subject of appeals. Although I had a different impression at first, I now think that this section does not touch the present question, which depends upon the extent of the proceedings under the Highway Act of 1835, which are included by the words "like proceedings" in s. 21.

The authorities that have been cited have not much bearing upon this question, because in all cases the intention of the legislature must depend to a great extent upon the particular object of the statute that has to be construed. I have come to the conclusion that the legislature intended to give an appeal in a case like the present. For these reasons I think the rule must be made absolute.

Rule absolute.

Attorneys for prosecutor: *J. & M. Pontifex.*
Attorneys for defendants: *Smallpiece & Son, Guildford*

1869
Dec. 13.

DAWKINS *v.* LORD F. PAULET.

Libel—Privileged Communication—Malice—Action by a Military Officer against his Superior Officer.

Plea to a declaration for libel, that the defendant was the superior military officer of the plaintiff, and the plaintiff was under his command, and it was the defendant's duty as such superior officer to forward to the adjutant-general of the army letters written and sent to him as such superior officer, in relation to their military conduct, duties, and qualifications by the officers under his command, and to make, for the information of the commander-in-chief, reports in writing to the adjutant-general on the subject of such letters; that the defendant, as such superior officer, had received from the plaintiff letters in relation to his military duties and to certain orders received by him as such officer and which the plaintiff requested might be forwarded by the defendant to the adjutant-general; and the defendant, in the course of military duty and as an act of military duty, forwarded the letters to the adjutant-general; and for the information of the commander-in-chief, when forwarding such letters, the defendant made certain reports in writing in relation to the letters of the plaintiff, which was the libel complained of. Replication, that the libel was written by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not bonâ fide, or in the bonâ fide discharge of the defendant's duty as such superior officer. On demurrer:—

Held, by Mellor and Lush, JJ., that the replication was bad: for that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer, even if done maliciously and without reasonable or probable cause.

Cockburn, C.J., dissenting, and holding, that an action would lie if the reports, though made under the circumstances alleged in the plea, were made of actual malice and without reasonable or probable cause.

First count, that the plaintiff was an officer and a lieutenant-colonel in the army, and held her Majesty's commission as captain in her Majesty's regiment of Coldstream guards, and was entitled to certain emoluments in respect thereof, and the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him as such officer and captain as aforesaid, in the form of a letter in the words following, that is to say:—"Sir,—I have the honour to forward a letter from Lieutenant-colonel Dawkins, Coldstream guards, complaining of an order which I considered it necessary to give in consequence of his incompetence in the field and of his unfitness to conduct the business of a battalion in barracks, and to request that his conduct may be referred for investigation by a court of inquiry. I am fully prepared

to support my judgment with regard to Lieutenant-colonel Dawkins by the evidence of general officers and others under whom he has served and with whom he has been brought in contact since he has risen to the rank of a superior officer. I have taken the present course advisedly in order to bring this case to a decision as in justice to the battalion to which he belongs. I submit that an officer who has shewn such want of judgment, tact, and temper, is not fit to be intrusted with the responsibility and charge of a command." Whereby the plaintiff lost the value of his said commission, and was compelled to leave his regiment, and was deprived of the emoluments he might and otherwise would have acquired from the holding of his said commission and continuing in his said regiment, and has been and is injured in his reputation as an officer and a soldier, and was and is otherwise greatly injured and damnified.

Second count, that the defendant falsely and maliciously wrote and published of and concerning the plaintiff, and of and concerning him in his profession as such officer as aforesaid, in the form of a letter, amongst other things, in the words and figures following, that is to say:—"If he feels himself aggrieved he has only himself to thank for the position in which he has placed himself, as I could not, in justice to myself, retract an order I had given him previously, and which he should have the good sense to understand was not to be cancelled by his surreptitiously assuming a command I considered him unfitted for." Whereby the plaintiff is injured in his reputation as an officer and a soldier.

Second plea, that the defendant was an officer in her Majesty's army on full pay, holding the public office or appointment of major-general commanding the brigate of foot guards, of which brigade the regiment of Coldstream guards formed part, and as such officer and major-general the defendant was the superior military officer of the plaintiff, and the plaintiff was under his command; and it was the defendant's duty as such superior military officer and major-general commanding, to forward to the adjutant-general of her Majesty's army at head-quarters certain letters from time to time written and sent to the defendant as such superior officer and major-general commanding, in relation to their military conduct, duties, and qualifications, by the officers under his command, and

1869

DAWKINS v. LORD PAULET.

to make thereupon, and in relation thereto, for the information of the commander-in-chief of the army, reports in writing to the adjutant-general of the army on the subject of such letters, and as to the orders, if any, therein referred to, and the military conduct, the qualifications, competence, and fitness for their military duties of the officers writing the same, and also generally from time to time to make reports in writing to the adjutant-general for the information of the commander-in-chief of the army of and concerning the battalions and regiments composing the brigade; and of and concerning the officers thereof under the defendant's command, and of and concerning their conduct, qualifications, competence, and fitness for their duties as such officers. And the defendant as such superior military officer and major-general commanding had received from the plaintiff certain letters in relation to the military duties of the plaintiff, and to certain orders received by the plaintiff as such officer, and to his conduct and his competence and fitness for his duties as such officer, in which letters, respectively, the plaintiff requested that the same might, to wit, in the performance of his military duties as such superior officer and major-general commanding, be forwarded by the defendant to the adjutant-general of the army for the information of the commander-in-chief of the army; and thereupon the defendant, in his capacity of major-general commanding, and in the ordinary course of his military duty as such superior military officer and major-general commanding, and because it became and was necessary and incumbent upon him by his duty to her Majesty as such superior military officer and major-general commanding so to do, and as an act of military duty and not otherwise or for any other reason, forwarded the letters to the adjutant-general of the army and for the information of the commander-in-chief of the army, when forwarding such letters made certain reports in writing in relation to the letters of the plaintiff and the contents and subject-matter thereof respectively, and to certain military orders received by the plaintiff therein respectively referred to, and with respect to the plaintiff's conduct as such officer as aforesaid in relation to the orders and other matters in the letters of the defendant mentioned, and as to the plaintiff's incompetence in the field, and his unfitness as such officer as aforesaid to conduct the business of a battalion in barracks,

to wit, in the form of letters addressed by the defendant to the adjutant-general of her Majesty's forces at head-quarters (being the proper officer in that behalf to receive the letters and the reports so forwarded and addressed respectively) and such occasion being the proper occasion according to the discipline and regulations in force in her Majesty's army for the defendant, as such superior military officer and major-general commanding as aforesaid, to make to the said adjutant-general such reports in writing as aforesaid, which are the letters of the defendant and the writing and publishing complained of in the first and second counts of the declaration respectively.

Second replication, that the words in the declaration mentioned were written and published by the defendant of actual malice on his the defendant's part and without any reasonable, probable, or justifiable cause, and not bonâ fide or in the bonâ fide discharge of the defendant's duty as such superior officer as in the plea alleged.

Demurrer, and joinder.

June 1. *Sir R. P. Collier*, *A. G.* (*Dowdeswell*, *Q.C.*, and *Archibald*, with him), in support of the demurrer. The plea is good, and the replication is bad. It does not allege that the statements contained in the letters of the defendant, which are charged to be libellous, were false to the knowledge of the defendant; the allegations in the replication are therefore insufficient. But under no circumstances could an action be maintained for the statements contained in these letters; they are a report from the defendant to his superior officer on the military capacity and qualifications of the plaintiff, and were written in the course of military duty. Such a communication is privileged. There are two classes of privileged communications: — 1. Those absolutely privileged. 2. Those privileged sub modo. In the latter class, although the communication is privileged, yet if there be evidence of express malice, the action will lie. But in the former class the communication is absolutely privileged on public grounds. Words spoken by a judge, or counsel, or witnesses, or parties at a trial, are absolutely privileged. A protection is accorded to a judge not for the benefit of a malicious or corrupt judge, but for the benefit of the public whose interest it is that the judges should be at liberty to

1869

DAWKINS v. LORD PAULET.

exercise their functions with independence and without fear of consequences: *Scott* v. *Stansfield* (1); *Fray* v. *Blackburn*. (2) The same law prevails in America: *Yates* v. *Lansing* (3), where all the old English authorities are cited and reviewed by Chief Justice Kent. So, an action will not lie against a barrister for words spoken by him in a cause: *Hodgson* v. *Scarlett*. (4) In 1 Hawkins, P. C. c. 28, s. 8, it is laid down that "no false or scandalous matter contained in a petition to a committee of parliament, or in articles of the peace exhibited to justices, or in any other proceeding in a regular course of justice, will make the complaint amount to a libel." The same law is to be found in Rolle's Abridg. 87, Pl. 4; and in the notes to *Lake* v. *King*. (5) No action lies against a person for any evidence given in a court: *Wyatt* v. *Gore* (6); *Keighley* v. *Ball*. (7) Equally, on grounds of public policy, an action will not lie against a military officer for acts done in the course of his military duty. In *Sutton* v. *Johnstone* (8), Lords Mansfield and Loughborough state their reasons why such an action cannot be maintained. The plaintiff is not without redress; for, as pointed out in that judgment, "The person unjustly accused is not without his remedy. He has the properest among military men. Reparation is done to him by an acquittal, and he who accused him unjustly is blasted for ever and dismissed the service." In *Home* v. *Bentinck* (9) a report made to the commander-in-chief by the president of a court of inquiry appointed to inquire into the conduct of the plaintiff was held to be privileged on the ground that it was made in the course of military duty. The plaintiff and defendant are both military officers, and the plaintiff complains of an act of the defendant done in the course of military duty relating to the military capacity and qualification of the plaintiff. The only matter involved in the libel is the military status of the plaintiff. This is not a question which can be tried by a court of law. In *Re Mansergh* (10), this Court said that where the *civil* rights of a person in military service are affected

(1) Law Rep. 3 Ex. 220.
(2) 3 B. & S. 576.
(3) 5 Joh. 282; 9 Joh. 395.
(4) 1 B. & A. 232.
(5) 1 Wm. Saund. 131, b.
(6) Holt, N. P. 299.
(7) 4 F. & F. at p. 799.
(8) 1 T. R. 493, 548, 550.
(9) 2 B. & B. 130.
(10) 1 B. & S. 400; 30 L. J. (Q.B.) 296.

1869

DAWKINS v. LORD PAULET.

by the judgment of a military tribunal acting in excess of their jurisdiction, the Court ought to interfere, but not where the only matter involved was the military status of the applicant, a thing which depends entirely on the Crown, seeing that every person who enters into military service engages to be entirely at the will and pleasure of the sovereign. *Dawkins* v. *Lord Rokeby* (1) is directly in point. The action was there brought for false imprisonment and malicious prosecution by the present plaintiff against his commanding officer, and Willes, J., nonsuited the plaintiff on the ground that a court of law will not take cognizance of matters of military discipline between military men. *Sutton* v. *Johnstone* (2), and the subsequent case of *Grant* v. *Gould* (3), appear to have been recognized as authorities.

A. S. Hill, Q.C. (*Holl* with him), for the plaintiff. The replication is good. The plea states facts which primâ facie justify the libel; but the replication alleges malice, and this is admitted by the demurrer, and as the defendant acted maliciously, he loses the protection to which he would otherwise have been entitled. It is not disputed that an action will not lie for words spoken by a person holding a judicial office, and a similar exemption is conferred upon counsel, witnesses, and jurymen. In *Sutton* v. *Johnstone* (4) the Court of Exchequer decided that the defendant, being a commanding officer, was liable for the imprisonment of a subordinate, if he were actuated by malicious motives, and that in arresting the plaintiff he had acted without reasonable or probable cause. In the Exchequer Chamber, this judgment was reversed by Lords Mansfield and Loughborough, whose judgment was affirmed in the House of Lords. (5) But the reversal of the judgment of the Exchequer must be taken to have proceeded on the ground that there was reasonable and probable cause; so that, as was said by Mansfield, C.J., in *Warden* v. *Bailey* (6), the only point decided in *Sutton* v. *Johnstone* (7) was, that there was probable cause for the imprisonment in that case; and Lawrence, J. (8), said that he had heard on good private information that the reasons assigned

(1) 4 F. & F. 806.
(2) 1 T. R. at p. 544.
(3) 2 H. Bl. 69.
(4) 1 T. R. 493, 510.
(5) 1 T. R. 784; 1 Bro. P. C. at p. 100.
(6) 4 Taunt. at p. 89.
(7) 1 T. R. 493.
(8) 4 Taunt. at p. 75.

1869

DAWKINS v. LORD PAULET.

by Lord Mansfield for reversing the judgment of the Court of Exchequer Chamber were not adopted by the House of Lords. There is no authority for saying such an action will not lie, and *Warden* v. *Bailey* (1) seems to shew that it will lie. In *Barwis* v. *Keppel* (2) an action was brought against an officer for reducing a non-commissioned officer to the ranks, and it was held not to lie solely on the ground that the cause of action had arisen during the time of war and out of the king's dominion, and it would appear to have been conceded that an action by a subordinate against his superior officer would lie if brought in time of peace for an act done within the realm. In *Dickson* v. *Earl of Wilton* (3), a case not unlike the present, Lord Campbell, C.J., left the question of malice to the jury, although the defendant's counsel urged that the libel was absolutely privileged; and in *Dickson* v. *Lord Combermere* (4), in an action of conspiracy and malicious prosecution, Cockburn, C.J., also left the question of malice to the jury. The ruling of Willes, J., in *Dawkins* v. *Lord Rokeby* (5) appears to have proceeded on Lord Mansfield's strong expression of opinion in *Sutton* v. *Johnstone.* (6) Practically, the plaintiff is without remedy if the action does not lie, for even if a court-martial were granted to investigate the matter, and it decided in his favour, it could not award him any compensation for the injury he had suffered.

Sir R. P. Collier, A. G., replied.

Cur. adv. vult.

Dec. 13. The following judgments were delivered:—

COCKBURN, C.J. This is an action for a libel written by the defendant concerning the plaintiff as an officer holding her Majesty's commission as a captain in the Coldstream guards, in a letter addressed by the defendant to the adjutant-general of the army, reflecting on the character and capacity of the plaintiff as an officer, and in which the plaintiff was represented as incompetent in the field and unfit to conduct the business of a battalion in barracks, and it was requested that his conduct might be referred for investigation by a court of inquiry, and in which it was finally submitted that an officer who had shewn such want of judgment

(1) 4 Taunt. 67, 75.
(2) 2 Wils. 314.
(3) 1 F. & F. 419.
(4) 3 F. & F. 527.
(5) 4 F. & F. 806.
(6) 1 T. R. 493.

tact and temper was not fit to be intrusted with the responsibility and charge of a command. By reason of which it is alleged that the plaintiff has lost his commission and has been compelled to leave his regiment, and has suffered in his reputation as an officer.

The declaration contains also a second count, but to which it is not material further to refer.

To this there is a plea of a somewhat prolix and confused character, but the sum and substance of it is that, the defendant being the commanding officer of the regiment in which the plaintiff was a captain, and the plaintiff having written a letter to the adjutant-general, complaining of an order given by the defendant as such commanding officer, and having, conformably to military regulations, sent such letter to the defendant, to be by him forwarded to the adjutant-general, it became the duty of the defendant, in transmitting the letter, to accompany it with a report on the order complained of, and the subject matter of the complaint, with such observations as the circumstances of the case appeared to require; that it thus became necessary, as a part of the duty of the defendant, to report on the incompetency and unfitness of the plaintiff; that the matter complained of was contained in a report thus made in the course of the defendant's duty as such commanding officer and in fulfilment of such duty and not otherwise or for any other reason.

To this plea there is a replication that the words complained of were written and published by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not bonâ fide, or in the bonâ fide discharge of the defendant's duty as alleged.

To this replication there is a demurrer, and we have to determine whether the replication affords a sufficient answer to the plea.

Independently of the great question of absolute privilege in military matters which presents itself in this case, there can, in my opinion, be no question that the replication is sufficient. If the effect of the plea is to be taken to be that the matter complained of was written for the purpose of causing an inquiry to be held as to the conduct and competency of the plaintiff with a view to his removal from the army, it is a sufficient answer in point of law to say that such a proceeding was malicious, and without reasonable and probable cause. If, which I think is the right view, the effect

1869

DAWKINS v. LORD PAULET.

of the plea is that the matter complained of was published in the discharge of a duty, and as such was privileged, it would under ordinary circumstances be sufficient to reply that the words were published maliciously and without bona fides.

For, to entitle matter, otherwise libellous, to the protection which attaches to communications made in the fulfilment of a duty, bona fides, or, to use our own equivalent, honesty of purpose, is essential; and to this, again, two things are necessary, 1, that the communication be made not merely in the course of duty, that is, on an occasion which would justify the making it, but also from a sense of duty; 2, that it be made with a belief of its truth.

By the demurrer, the defendant, for the present purpose at least, in order to raise this question of law, admits, as he must do, that the averments in the replication are true; in other words that his representations as to the plaintiff, though made on an occasion of military duty were made dishonestly, maliciously, and without a belief in their truth.

To support this demurrer, it is therefore necessary to maintain that in all matters relating to military authority and discipline a subordinate officer is, so far as civil redress is concerned, entirely at the mercy of his superior; that the latter may institute proceedings against him, without right or reason, on charges which he knows to be unfounded, may, under the disguise of duty, write concerning him that which he knows to be false and may thus bring upon him consequences the most disastrous, without the party injured being entitled to redress in a court of law. While I fully agree that acts done in the honest exercise of military authority are entirely privileged, I confess that I am not prepared to arrive at a conclusion so startling and apparently unjust as that, if the opportunity it affords is intentionally abused for the purposes of injury and wrong, no redress is to be had by a sufferer in a court of law.

The question may be considered with reference first, to legal authority, secondly, to general principles, and thirdly to the peculiar position of persons in the army and navy as distinguished from the rest of the Queen's subjects. The question first came before the courts in 1785, in the great case of *Sutton* v. *Johnstone* (1), which was an action against the defendant for having, as com-

(1) 1 T. R. 493.

manding officer of a fleet, maliciously and without reasonable and probable cause, brought the plaintiff to a court-martial for breach of duty and disobedience of orders. Two principal questions arose, first, whether the action, as brought by an inferior against a superior officer would lie, and secondly, whether the facts upon which the defendant had acted in instituting proceedings against the plaintiff amounted to reasonable and probable cause. A second verdict with large damages having been given for the plaintiff, and a motion in arrest of judgment having been made in the Court of Exchequer, in which the action had been brought, Eyre B. delivered the judgment of the Court. In the difference of opinion which exists on this very important question, I think it desirable to recall to recollection this remarkable and, to my mind, satisfactory judgment. Dealing with the first branch of the case, he says (1): "The Court never had a difficulty upon this part of the case. The principle of the action . . . is general and universal. In the cases alluded to of judges and jurors, it cannot apply, because the law gives faith and credence to what they do; and therefore there must always, in what they do, be cause for it; and there never can be any malice in what they do. The presumption of law, that judges and jurors do nothing causelessly and maliciously, does not derogate from the universality of the principle, 'that where it can be shewn that one man has causelessly and maliciously accused another of a crime, or has otherwise vexed him by causelessly and maliciously exercising upon him, to his damage, powers incident to his situation of superior, the injured party is entitled to redress by this species of action.' The commander-in-chief of a squadron of ships of war is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation. The propositions, which attempt to establish a distinction for him, are dangerously loose and indefinite. It is said, subordinate officers may be brought to a court-martial for improper conduct, and that no action lies for anything done in a course of discipline, or under powers incident to situation. If, by improper conduct, be meant a breach of the articles for the government of the navy; if, by a course of discipline, be meant exacting that which the discipline of the navy requires; if, by what is done under powers, be meant that which is warranted to be done under

(1) 1 T. R. at p. 503.

1869

DAWKINS v. LORD PAULET.

those powers; it will be agreed simply, that for doing any of those acts no action will lie: for those are lawful acts in themselves, and there is nothing added to make them unlawful in the particular case. But in respect of the first branch of this proposition, if it be meant that a commander-in-chief has a privilege to bring a subordinate officer to a court-martial for an offence of which he knows him to be innocent, under colour of his power, or of the duty of his situation to bring forward inquiries into the conduct of his officers, the proposition is too monstrous to be debated. Under the second branch of it, it may not be fit, in point of discipline, that a subordinate officer should dispute the commands of his superior, if he were ordered to go to the mast-head: but if the superior were to order him thither, knowing that, from some bodily infirmity, it was impossible he should execute the order, and that he must infallibly break his neck in the attempt, and it were so to happen, the discipline of the navy would not protect that superior from being guilty of the crime of murder. And one may observe in general, in respect of what is done under powers incident to situations, that there is a wide difference between indulging to situation a latitude touching the extent of power and touching the abuse of it. Cases may be put of situations so critical that the power ought to be unbounded: but it is impossible to state a case where it is necessary that it should be abused; and it is the felicity of those who live under a free constitution of government, that it is equally impossible to state a case where it can be abused with impunity. . . . We enter into all the difficulties in the situation of an officer, whose honour and fortune may come to be so staked. In this particular case they have had their weight with us; the decision has not been a hasty one; but considerations of this nature cannot exclude the established jurisdiction of the country: on the contrary those jurisdictions must be presumed to be equal to their functions: it must be presumed that they will do their duty honestly; if they do, no man can have much to fear. To situations which require indulgence, they will shew it; but, be the risk more or less, all men hold their situations in this country upon the terms of submitting to have their conduct examined and measured by that standard which the law has established. Men of honour will do their duty and will abide the consequences."

Error having been brought on this judgment, the case was twice argued before Lord Mansfield and Lord Loughborough, the latter being then Chief Justice of the Court of Common Pleas, and the judgment of the Court of Exchequer was reversed; not, however, on the ground that the action would not lie, but solely on the ground that the facts sufficiently shewed the existence of reasonable and probable cause. Lord Mansfield, in a masterly argument, to which I shall again have occasion to refer, gives his reasons for thinking that such an action ought not to be allowed; but he stops short of deciding the point. At the conclusion of his reasoning he says (1): "These considerations incline us to lean against introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases, which is applicable to trials by a sea court-martial under the marine law, confirmed, directed, and authorized by statute. And therefore it must be owned that the question is doubtful; and when a judgment shall depend upon the decision of this question, it is fit to be settled by the highest authority. According to our opinion, it is not necessary to the judgment in this case. Because, supposing the action to lie, we think the judgment ought to be given for the defendant."

The judgment of the two Chief Justices was subsequently affirmed in the House of Lords, but, as it appears, on the same ground, namely the existence of reasonable and probable cause. In the later case of *Warden* v. *Bailey* (2), Lawrence, J., in the course of the argument, stated that he had heard "from good private information that the reasons assigned by Lord Mansfield ... were not adopted by the House of Lords, though the judgment of the Chief Justice was affirmed."

The same question presented itself in the case just referred to, of *Warden* v. *Bailey*. (3) There the plaintiff, a sergeant in a regiment of militia, having been arrested by the defendant, the adjutant of the regiment, by order of the lieutenant-colonel, for disobedience of an order of the latter with reference to attendance at an evening school, and contribution to its support, and for inciting others of the regiment to disobey the order, and having

(1) 1 T. R. at p. 550. (2) 4 Taunt. at p. 75.
(3) 4 Taunt. 67.

1869

DAWKINS v. LORD PAULET.

brought an action for such arrest and imprisonment, the learned judge who presided on the trial, on the authority of the case of *Sutton* v. *Johnstone* (1), nonsuited the plaintiff. On a motion to set the nonsuit aside, it was again strenuously urged, as before in *Sutton* v. *Johnstone* (1), that the action would not lie. The Court, however, holding *Sutton* v. *Johnstone* (1) as falling altogether short of deciding so large a proposition, set the nonsuit aside, on the ground that while there was no evidence of the mutinous language attributed to the plaintiff, the order of the colonel to attend the school and contribute to the expense of it was beyond the scope of his military authority, and that consequently the disobedience of the order did not justify the arrest.

On a second trial, before Sir James Mansfield, the learned judge having ruled according to the foregoing decision, a bill of exceptions was tendered, and the case came on before the Court of King's Bench sitting as a court of error. The same points appear to have been made as had been urged in the court below, and in the end the Court gave judgment for the defendant in the action; not however on the ground that the action would not lie, but that there was sufficient evidence of mutinous language having been used by the plaintiff to justify the arrest. (2) It can hardly be supposed that, had the Court been prepared to adopt the reasoning of Lord Mansfield in *Sutton* v. *Johnstone* (1), they would not have disposed of the case on the question of law instead of going into an elaborate investigation of the evidence.

The question again presented itself in an action brought by the present plaintiff, Colonel Dawkins, against Lord Rokeby (3), an action arising out of the same transaction and regimental disputes. The action was for false imprisonment, malicious prosecution, and conspiracy to cause the plaintiff's removal from the army. The cause came on for trial before Willes, J., at nisi prius, when the learned judge is reported to have ruled, partly on similar grounds to those set forth by Lord Mansfield in *Sutton* v. *Johnstone* (1), and partly because it had been so decided in that case, that even were it proved that the proceedings ascribed to the defendant had been malicious and without reasonable and probable cause, and that he

(1) 1 T. R. 544. (2) 4 M. & S. 400.
(3) 4 F. & F. 806.

had been the prime mover in the dismissal of Colonel Dawkins from the army, the latter could not obtain redress from a court of law; and he accordingly nonsuited the plaintiff.

These are the authorities directly bearing on the question; and the result of them appears to me to be that so much of the decision of the Court of Exchequer in *Sutton* v. *Johnstone* (1), as is immediately in point to the present case, stands unreversed, either by the judgment in error in that case, or by any subsequent decision of a Court in banco; while it is supported by the decision of the Court of Common Pleas in *Warden* v. *Bailey* (2), and incidentally and indirectly so by the decision of the Court of King's Bench, when that case was before them in error. (3) The case of *Dawkins* v. *Lord Rokeby* (4) is no doubt to the contrary. But however great my respect for the opinion of the learned judge who presided, I cannot hold myself bound by a single ruling at nisi prius, however positively expressed, in a matter in which the Court of Exchequer in *Sutton* v. *Johnstone* (1), expressly, and the Court of Common Pleas in *Warden* v. *Bailey* (2), as incidentally appears, entertained a different opinion, and which Lord Mansfield himself declared to be open to grave doubt and fit to be decided by the highest authority.

But it is argued that, independently of authority, as a matter of public policy, an action of this nature ought not to be allowed, and that, as in the case of judges, jurors, and witnesses, acting in the administration of justice, an absolute immunity is afforded, however unrighteous may have been their acts, however malicious and sinister their motives; so, by analogy, and on like grounds of public policy, superior officers in military or naval command ought to enjoy entire immunity in respect of acts, however unjust and malicious, done by them in the exercise of their authority. The argument cannot be put more forcibly than it is presented in the reasoning of Lord Mansfield, in *Sutton* v. *Johnstone*. (5) In substance it comes to this. It is essential to the efficiency of an army that discipline should be upheld; that obedience to orders however desperate and peremptory should be enforced; that the energy

(1) 4 F. & F. 806.
(2) 4 Taunt. 67.
(3) 4 M. & S. 400.
(4) 4 F. & F. 806.
(6) 1 T. R. 544.

1869

DAWKINS v. LORD PAULET.

of commanding officers in giving such orders, in cases of trying emergency, and enforcing obedience of orders and observance of discipline, by bringing those guilty of disobedience of orders or of breach of discipline to punishment according to military law, should not be crippled by the apprehension of vexatious actions; more especially as juries by whom such actions would have to be decided are incompetent to form a judgment on matters of a military or naval character, and might adopt conclusions different from those at which a professional tribunal, alone fitted to decide on such a matter, might arrive; and that if any of those who have voluntarily submitted themselves to military law should suffer injustice or oppression at the hands of a superior they must be content with such redress as the military law affords.

Yielding to no one in respect for an opinion of Lord Mansfield, I must say that this reasoning fails to bring conviction to my mind. I cannot bring myself to believe that officers in command would hesitate to give orders which a sense of duty required, or to enforce obedience and discipline in the due exercise of authority, from any idle apprehension of being harrassed by vexatious actions. Men worthy to command would do their duty, as Eyre, B., expresses it, "fearless of consequences," and would trust to the firmness of judges, and the honesty and good sense of juries to protect them in respect of acts honestly, though possibly erroneously, done under a sense of duty. On the other hand, while no man would more strenuously uphold military authority when legitimately exercised, or would more earnestly urge upon juries the propriety of presuming everything in favour of its legitimate exercise, and of requiring the most cogent and conclusive evidence of its abuse, to entitle an inferior officer to recover in an action against a superior, I cannot bring myself to think that it is essential to the well-being of our military or naval force, that where authority is intentionally abused for the purpose of injustice or oppression, where charges are preferred which to the knowledge of the party preferring them are intentionally unjust, where representations are made which the party making them knows to be slanderous and false, the party injured, whose professional prospects may have been ruined and whose professional reputation may have been blasted, is to be told that the Queen's Courts, in a

country whose boast it is that there is no wrong without redress, are shut to his just complaint. On the contrary, I cannot but believe that to a force depending on voluntary augmentation, it will be far more beneficial that its subordinate members shall know that against intentional oppression and manifest wrong, leading to consequences disastrous to professional interests or character, redress may be found in the civil tribunals of the country. Neither can I believe that a jury, under the guidance of a judge, may not be safely entrusted with the decision of such questions. No doubt, in matters of military discipline and government, a military tribunal is better qualified to form a correct judgment; and where the questions turned on nice points of military or naval tactics a jury would be advised,—and doubtless would act on such advice,—to presume in favour of military or naval authority. But in cases of manifest wrong and proved malicious motives, no tribunal can be better qualified to form a just and correct judgment. Nor can I admit the incompetency of juries, when assisted by professional evidence to form correct judgments, even on professional matters. Every day special juries are called upon to decide questions turning on matters of science and professional knowledge, foreign to their ordinary avocations, among others questions of navigation and nautical skill, and their decisions are on the whole satisfactory. At all events trial by jury in matters of wrong between man and man is an essential part of our judicial system, and, as it appears to me, the question of the competency or incompetency of the tribunal cannot be admitted as an element in our decision of the present question. Neither, I must say, do I feel the force of the argument that an individual, on becoming a soldier consents, in case of being driven from the army or suffering other wrong by the dishonest exercise of superior authority, to be subject to and abide by the military law alone; or that, as a superior making malicious and unfounded charges against another is amenable to punishment by the military law, redress in such a case is to be sought under the military law and at the hands of a military tribunal alone. It is undoubtedly true that a man on entering the army or navy subjects himself to military law, and wherever that law conflicts with the civil law applicable to the ordinary subject, he must be content to forego the rights which the

1869

DAWKINS v. LORD PAULET.

ordinary law affords. And if, by any provision of the military code, a party subjected to its authority were prohibited from resorting to civil tribunals for the redress of a wrong inflicted under colour of military authority, there would be an end of the question. But no such prohibition exists; and though the punishment of the wrong-doer may be in some sort a satisfaction to the party injured, it can afford no compensation for the fatal consequences in a professional or pecuniary point of view which may have resulted from the wrong.

But whatever may be the right view of this matter with reference to considerations of policy, a grave question appears to me to present itself as to how far a court of law is warranted, in the absence of positive law or previous decision, in refusing redress in a case of admitted wrong and in which the right of action would otherwise be undoubted, simply because on grounds of public convenience the action as between the particular parties ought not to be allowed. The case of judges and jurymen seems to me, I must say, very remote. It does not seem to have appeared to Lord Mansfield to be analogous, as he expressly says that no principle can be gathered from other cases analogous to the present. It may be that the immunity, afforded to judges and others concerned in the administration of justice, may be essential to that great end. It does not follow that a soldier persecuted or slandered by another shall be left without civil remedy. For my own part I should prefer to treat the immunity of judges as a matter positivi juris, as settled by decision and authority, rather than as resting on sound or satisfactory principles, on which, were the matter res integra, it would be desirable to act. I cannot believe that judges or juries would fail to discharge their duty faithfully and fearlessly according to their oaths and consciences, or witnesses give evidence less truthfully, from any fear of exposing themselves to actions at law. I am persuaded that the number of such actions would be infinitely small and would be easily disposed of. While, on the other hand, I can easily conceive cases in which judicial opportunity might be so perverted and abused for the purpose of injustice as that, on sound principles, the authors of such wrong ought to be responsible to the parties wronged. At all events it seems to me by no means to follow, that because such a principle

may be required in the interest of the administration of justice, it is to be applied, without positive enactment, to wrong inflicted by one member of the land or naval forces of the Crown upon another.

Thinking the question of policy more than doubtful for the reasons I have given,—though after the reasoning of Lord Mansfield, the ruling of Willes, J., and the opinion of my learned Brothers, from whom I have the misfortune to differ, I of course feel the utmost diffidence in my own views,—thinking also that it is exceedingly doubtful whether, assuming that as a matter of public policy an action by an inferior against a superior officer ought not to be maintained, a court of law, in the absence of positive enactment can act upon such an assumption, I cannot but think that if the law is to be thus settled, it should be done by legislative enactment, or at all events by a court of error, and that, acting as a court of the first instance in dealing with this demurrer, we should give judgment for the plaintiff; but my learned Brothers, for reasons they will themselves give, have arrived at a different conclusion, and, therefore, judgment must be given for the defendant.

MELLOR, J. This case was argued before my Lord Chief Justice, my Brother Lush, the late Mr. Justice Hayes, and myself, in Trinity Term last, and the judgment which I am about to deliver was entirely approved by my lamented friend, Mr. Justice Hayes.

I approach this subject with great diffidence, seeing that my Lord Chief Justice has arrived at an essentially different conclusion.

This is an action of libel brought by the plaintiff, who was a lieutenant-colonel in the army, holding a commission as captain in her Majesty's regiment of Coldstream guards, against the defendant, who held the office of major-general commanding the brigade of foot guards, of which the regiment of Coldstream guards formed a part. The alleged libels were contained in certain letters written and sent by the defendant to the adjutant-general, for the information of the commander-in-chief, enclosing and commenting upon letters sent by the plaintiff to him, and which the plaintiff required the defendant, as his superior officer, to forward to the adjutant-general.

1869

DAWKINS
v.
LORD PAULET.

The question to be determined by the Court arises upon a demurrer to the replication to a plea. The plea alleges that the defendant when he wrote and published the letters, was an officer in her Majesty's army, holding the public office or appointment of major-general commanding the brigade of foot guards, of which the regiment of Coldstream guards formed part, and was the superior military officer of the plaintiff, who was under his command; and *that it was the defendant's duty, as such superior military officer*, to forward to the adjutant-general of her Majesty's army at head-quarters, certain letters written and sent to the defendant as such superior officer, and major-general as aforesaid, in relation to their military conduct, duties, and qualifications by the officers under his command, and to make in relation thereto, for the information of the commander-in-chief of the army, reports in writing to the said adjutant-general on the subjects of such letters. The plea then states the receipt by the defendant from the plaintiff of certain letters in relation to the plaintiff's military duty, and to certain orders received by him as such officer, and to his conduct, and competence, and fitness for such duties as such officer, in which letters the plaintiff requested that the same might, in performance of the defendant's duty as such superior officer, be forwarded by the defendant to the adjutant-general, for the information of the commander-in-chief; and that *thereupon* the defendant, *in the ordinary course of his military duty, as such superior military officer, and because it became and was necessary and incumbent upon him by his duty to her Majesty, as such superior military officer so to do, and as an act of military duty, and not otherwise, or for any other reason*, forwarded the said letters to the adjutant-general; and for the information of the commander-in-chief, when forwarding such letters, made certain reports in writing in relation to the said letters, and the contents thereof, and to certain military orders therein referred to, and with respect to the plaintiff's conduct as such officer as aforesaid, in relation to the said orders, and to the plaintiff's incompetence in the field, and his unfitness to conduct the business of the battalion in barracks, and that such reports were in the form of letters addressed to the adjutant-general, *being the proper officer* to receive such letters and reports which were forwarded on an occasion *being the proper occasion*

according to the discipline and regulations in force in her Majesty's army for the defendant to make such reports in writing, and which are the letters whereof the writing and publication is the matter complained of by the plaintiff.

To this plea the plaintiff replied, that the words in the declaration mentioned were written and published *of actual malice* on the defendant's part, and without any reasonable, probable, or justifiable cause, and not bonâ fide, or in the bonâ fide discharge of the defendant's duty as such superior officer as aforesaid. To this replication the defendant demurred, and, as one ground of demurrer, alleged that no action is maintainable in respect of words written and published under the circumstances stated in the plea, even if written or published maliciously and without reasonable or justifiable cause.

It is to be observed, that the replication admits the facts stated in the plea, namely, that the letters in question were written and published by the defendant in the ordinary course of his duty as commanding officer to the adjutant-general, for the information of the commander-in-chief, *and as an act of military duty, and not otherwise, or for any other reason*, yet seeks to avoid the effect of that admission by the allegation that they were written and published of actual malice on the defendant's part, and without reasonable or justifiable cause, and not bonâ fide or in the bonâ fide discharge of the defendant's duty as such superior officer. I am of opinion that such replication is bad, and is no answer to the matters alleged in the plea. If it was the defendant's duty to write such letters and to make such reports touching the plaintiff's conduct, qualifications, and fitness as an officer, which is admitted by the replication, I do not see how it makes the defendant's conduct actionable, because he did what it was his duty to do maliciously, and not bonâ fide in the discharge of his duty. The defendant, in substance, says, "I did my duty, and nothing more than my duty," to which the plaintiff replies, "I admit that you wrote the letters and reports as an act of military duty, and not otherwise, but you did so maliciously, and without reasonable, or probable, or justifiable cause, and not bonâ fide." It is difficult to comprehend how it could be without reasonable, or probable, or justifiable cause, *if done as an act of duty* which it is

1869

DAWKINS v. LORD PAULET.

incumbent upon him to do. It is to be observed, that the replication contains no allegation that the statements contained in the reports were false to the defendant's knowledge, and I am clearly of opinion that, without such an allegation, the words "without reasonable, or probable, or justifiable cause, and not bonâ fide," are, in connection with the admissions in the replication, simply insensible and repugnant. I must not be taken to admit that, had such an allegation appeared on the record, it would have entitled the plaintiff to judgment on the demurrer, but it would have given rise to different considerations.

I apprehend that the motives under which a man acts in doing a duty which it is incumbent upon him to do, cannot make the doing of that duty actionable, however malicious they may be. I think that the law regards the doing of the duty, and not the motives from or under which it is done. In short, it appears to me, that the proposition resulting from the admitted statements on this record amounts to this: Does an action lie against a man for maliciously doing his duty? I am of opinion that it does not; and therefore, upon the pleadings as they stand, we might give judgment for the defendant.

The Attorney General, however, did not rest the case on the effect of the admissions in the pleadings, but contended broadly that no action would lie at law against an officer of the army charged with duties such as those stated on the record, for the discharge of them. He likened the case of the defendant to that of the judges of courts of law, to grand jurymen, petty jurymen, and to witnesses, against whom no action lies for what they do in the course of their duty, however maliciously they may do it. He claimed the immunity for the defendant for acts done in the course of his duty on the highest grounds of policy and convenience. No judge, nor juryman, nor witness, he said, could discharge his duty freely, if not protected by a positive rule of law from being harassed by actions in respect of the mode in which he did the duty imposed upon him, and he contended that the position of the defendant manifestly required the like protection to be extended to him, and to all officers in the same position; and there is, I think, little doubt that the reasons which justify the immunity in the one case, do in great measure extend to the other. How can a

commander freely communicate his real opinions to the adjutant-general as to the conduct, qualifications, or fitness for particular duty of any officer under his command, if his opinion be prejudicial to such officer, under the dread of an action for libel, or other action, which, if he were not protected, might be brought against him by any dissatisfied subordinate officer who might consider himself aggrieved? To this it may be answered, that no action would lie, as his communication would be privileged, if made bonâ fide and without malice. On the other hand, it must be observed that, although his communication might be privileged under such circumstances, still cases might frequently occur in which the judge on a trial at law would have to submit to a jury the most difficult question of military discipline, such as whether orders disobeyed were proper orders for a commander to give, or given maliciously and not bonâ fide, or whether the opinion expressed as to the competence of a subordinate officer for particular duties was justifiable or not. The promotion of an incompetent man may cause the greatest disaster, and yet, if the person who has to make his report as to the fitness or unfitness of such officer is to do it under the idea that the opinion he expresses may be overruled by a jury ignorant of such matters, how can he be expected to do it freely? The Attorney General relied not only upon the analogy he drew from the case of a judge, juryman, or witness, but he cited, in support of his argument, the opinion of Lord Mansfield and Lord Loughborough, in the case of *Sutton* v. *Johnstone* (1); and there is no doubt that those eminent judges did, in the court of error, express an opinion in the analogous case of an action for a malicious prosecution of a naval officer by the commander-in-chief of a naval squadron before a naval court-martial that no such action could lie, and in the course of their observations they said (2), "If this action be admitted, every acquittal before a court-martial will produce one. Not knowing the law, or the rules of evidence, no commander or superior officer will dare to act; their inferiors will insult and threaten them." And, again, "If every trial that is by court-martial is to be followed by an action, it is easy to see how endless the confusion, how infinite the mischief will be." These considerations appear to me to apply à fortiori to a case like the

(1) 1 T. R. 544.

(2) 1 T. R. at pp. 549, 550.

1869

DAWKINS v. LORD PAULET.

present, in which the letters and reports complained of were written by the defendant in the performance of a positive duty, and for the purpose of obtaining an investigation of the matters therein alleged by a competent military tribunal.

It is to be observed, that the opinion expressed by Lords Mansfield and Loughborough, although of the greatest weight, and given after the fullest consideration, was not necessary to the judgment in that case, which actually proceeded on other grounds, and therefore does not amount to a decision binding us to declare that no such action will lie, and does not conclude us with reference to the present case, but the exposition of the law expressed in that opinion has been generally accepted, and referred to in other cases as a very weighty authority. It was evidently given after great consideration, and derives additional weight from the fact that it was delivered in a court of error, and after an argument displaying the greatest ability and research. It proceeds upon the principle that "the law will rather suffer a private mischief than a public inconvenience." It was observed by Eyre, B., in delivering the opinion of the Court of Exchequer (1), that the ground upon which the immunity from actions, enjoyed by judges and jurymen proceeds, is, that "the law gives faith and credence to what they do, and therefore there must always, in what they do, be cause for it, and there never can be any malice in what they do." Crompton, J., in *Fray* v. *Blackburn* (2), stated that the immunity of judges of the superior courts was established to secure their independence, and to prevent them being harrassed by vexatious actions. It is manifest that the administration of justice would be paralyzed if those who are engaged in it were to be liable to actions upon the imputation that they had acted maliciously and not bonâ fide; and it is to be observed that this absolute privilege is not confined to the administration of justice in the superior courts, but it has been also applied in its fullest extent to judges of the county courts: *Scott* v. *Stansfield* (3); nor is it indeed confined to the administration of justice; for it is well established that members of parliament cannot be called in question out of parliament for anything they may say in parliament in the course of any proceedings in parliament, and, in

(1) 1 T. R. at p. 503. (2) 3 B. & S. at p. 578.
(3) Law Rep. 3 Ex. 220.

like manner, ministers of the crown cannot, from reasons of the highest policy and convenience, be called to account in an action for any advice which they think right to tender to the Sovereign, however prejudicial such advice may be to individuals.

Do not these reasons of public policy and convenience strongly apply to the present case? Can the administrative duties discharged by officers of the army in the position of the defendant be liable to be reviewed by a jury in an action at law without producing the greatest mischief and public inconvenience? I shall presently shew that a special mode of redress for all officers in the army who consider themselves wronged by their superior officers in relation to the discipline and government of the army is expressly provided by the articles of war, and in that view how inconsistent it would be that the judgment of a military tribunal, familiar with the question, should be liable to be reversed, and a different result obtained by the verdict of a jury in an action at law upon the very same facts? It is true that a standing army was unknown to the common law, and was always looked upon with great jealousy by our ancestors, but it is now, and has been for many years, regulated by acts of parliament, and by articles of war framed under them which provide appropriate courts and suitable machinery, and there is now a secretary of state for war, expressly appointed by the crown, with a series of officers charged with particular duties and functions, all tending to the regulation and government of her Majesty's forces, and I cannot but think that the analogies referred to do in principle apply to such a state of things.

Upon these considerations, and supported by the opinion of Lords Mansfield and Loughborough and that of other judges, I come to the conclusion that the present action will not lie.

There was another ground of great importance upon which the Attorney General insisted, and which strongly supports the opinions above expressed. He argued that the plaintiff, being at the time of the printing and publishing of the letters and reports an officer of the army, and the defendant being his commanding officer, and the letters and reports in question being matters simply relating to military duties and discipline, and to the administration of the army, the plaintiff, if he had ground of complaint in respect of them, was bound to make it to the tribunal specially provided by

1869

DAWKINS v. LORD PAULET.

the mutiny act and articles of war relating thereto; and that it was the only tribunal to which a military officer could appeal in respect of such matters. There is no doubt that the 12th section of the articles of war does provide: "That if any officer shall think himself wronged by his commanding officer, and shall upon due application made to him, not receive the redress to which he may consider himself to be entitled, he may complain to the general commanding-in-chief of our forces in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state of war, to make his report to us thereupon in order to receive our further directions." And it is also provided that all the provisions of the articles of war "shall apply to every person who is, or shall be, commissioned or in pay as an officer." It would seem to follow from the provisions thus made by the articles of war for a special mode of redress for every officer who may think himself wronged by his commanding officer, that it was intended that every officer aggrieved by any order or report made in the course of the administration of the army must follow the special mode of redress pointed out in the articles of war, and that in respect of any grievances or complaint arising out of such administration, he can have no redress in any other way. Certainly this view of the law is supported by the opinions of Lords Mansfield and Loughborough, expressed in the case of *Johnstone* v. *Sutton* (1), above referred to, in which it is said: "Commanders in the day of battle must act upon delicate suspicion, upon the evidence of their own eye; they must give desperate commands; they must require instantaneous obedience; in case of a general misbehaviour they may be forced to suspend several officers, and put others in their places. A military tribunal is capable of feeling all these circumstances, and understanding that the first, second, and third part of a soldier is obedience; but what condition will a commander be in, if upon the exercising of his authority he is liable to be tried by the common law judicature?" I think that these considerations tend strongly to shew that the legislature, in providing special means of redress for officers feeling themselves aggrieved by any exercise of ordinary military authority or duty, by establishing special tribunals for the

(1) 1 T. R. 544.

purpose by the articles of war, did intend to preclude such officers from appealing to the ordinary tribunals in respect of such matters. This view is confirmed by the opinion of Willes, J., in *Dawkins* v. *Lord Rokeby* (1), upon which he nonsuited the plaintiff in an analogous action, and which, so far as I am aware, was not afterwards questioned, he is reported to have said as follows:—"With respect to military men, I beg to say that I cannot conceive anything more fatal to themselves, anything more fatal to the discipline or subordination of the army, if every officer who considers himself to have been slighted by his inferiors, or every officer aggrieved by his superiors, whom, having become a soldier, he has consented to submit to, should seek to undo their judgment before a tribunal which must necessarily have but slight acquaintance with those matters upon which it is called to pronounce an opinion. I have no doubt that this is law, and that it is that which is most beneficial to the community." The cases of *Grant* v. *Gould* (2), and *Barwis* v. *Keppel* (3), strongly support the same view. In *Grant* v. *Gould* (4) Lord Loughborough said: "The object of the mutiny act, therefore, is to create a court invested with authority to try those who are a part of the army in all their different descriptions of officers and soldiers, and the object of the trial is limited to breaches of military duty. Even by that extensive power granted by the legislature to his Majesty to make articles of war, those articles are to be for the better government of his forces, and can extend no further than they are thought necessary to the regularity and due discipline of the army;" and in that case, prohibition being refused, Lord Loughborough further said (5), speaking of a military court-martial sitting under the articles of war: "This court being established in this country by positive law, the proceedings of it, and the relation in which it will stand to the courts in Westminster Hall, must depend upon the same rules with all other courts which are instituted, and have particular powers given to them."

It appears to me that upon the ground that the defendant and the plaintiff were both officers in the army, the defendant being

(1) 4 F. & F. 841.
(2) 2 H. Bl. 69.
(3) 2 Wils. 314.
(4) 2 H. Bl. at p. 100.
(5) 2 H. Bl. at p. 101.

1869

DAWKINS v. LORD PAULET.

the superior officer, and both being bound by the articles of war, it was the duty of the plaintiff to adopt the remedy thereby provided with reference to the matters whereof he complains, and that he has no remedy at law in respect thereof. I am therefore of opinion that, upon all these grounds, our judgment must be for the defendant.

LUSH, J. (1) It is admitted on the record that the letters complained of were reports made to the adjutant-general of the army for the information of the commander-in-chief by the defendant, as the superior military officer of the plaintiff in the discharge and under the obligation of military duty, touching the competence of the plaintiff as an officer and his fitness for command in the field and in barracks. And the question turns on the validity of the replication, which alleges that these reports were made of actual malice, and without any reasonable, probable, or justifiable cause, and not bonâ fide, or in the bonâ fide discharge of the defendant's duty as such superior officer.

In the view which I take of this case, it is unnecessary to determine what is the precise meaning intended to be conveyed by the latter allegation; whether it is merely a repetition in another form of the malicious motive, or whether, by saying that the letters were not written bonâ fide, or in the bonâ fide discharge of duty, is meant that the defendant knew the statements in them to be false. For, however they may be construed, I am of opinion that the question raised is one purely of military cognizance, and not within the province of a court of law.

It is to be observed that the letters complained of reflect on the plaintiff in his capacity of military officer, and in that capacity only. They affect his character, not as a citizen, but as a soldier, and they were written, not for circulation amongst the public, nor to a private individual, but to the proper military authority, and for the purpose of originating an inquiry into the competence of the plaintiff, and the propriety of an order which the defendant, as his superior officer, had made.

A standing army is an institution unknown to the common law.

(1) This judgment was read by Mellor, J., Lush, J. being absent on the winter assize.

1869

DAWKINS v. LORD PAULET.

Without the mutiny act the relation between the plaintiff and the defendant, out of and in respect of which this complaint arises, could not have existed in time of peace; and an army raised in time of war would have been entirely under the dominion and control of the Crown, and all questions of military discipline and abuse of power decided by its own absolute authority. On this ground it was held in *Barwis* v. *Keppel* (1), that an action would not lie by a private soldier against his commanding officer for reducing him on the field of battle from a serjeant to the ranks, though the act was alleged to have been done maliciously, and without any reasonable or probable cause. If, therefore, the jurisdiction claimed for this Court by the plaintiff exists, it must be derived from the Act by which the army is created and governed. No such jurisdiction is given in terms, and so far from its being conferred by implication, I think it clear that the intention of the legislature was to exclude the interference of the courts of law, and to confine all matters of complaint of a purely military character to the military authorities. For the mutiny act, supplemented by the articles of war, constitutes what purports to be a complete military code. It professes to deal with the whole military conduct of every soldier, and in every department of the service. It provides rules for the protection of the subordinate against his superior officer, as well as for due subordination; for the redress of grievances, as well as the punishment of offences; and appropriate tribunals are constituted for administering and enforcing these provisions.

Amongst the articles of war, are two sections headed: "Redress of Wrongs:" the one applying to commissioned, the other to non-commissioned officers and privates. The first, which, I presume, is the one under which the plaintiff acted, as stated in the plea, is to this effect:—"If any officer shall think himself wronged by his commanding officer, and shall upon application made to him, not receive the redress to which he may consider himself entitled, he may complain to the general commanding-in-chief of our forces, in order to obtain justice; who is hereby required to examine into such complaint, and either by himself, or by our secretary of state for war, to make his report to us thereupon in order to receive our further directions." Can it be reasonably inferred that any other

(1) 2 Wils. 314.

1869

DAWKINS v. LORD PAULET.

mode or measure of redress was intended by the Act than that which is specified in this article? It is no argument to say that the remedy is imperfect, because no pecuniary compensation is given to the injured party. That defect, if it be one, is a defect in the code itself, which we cannot remedy. The plaintiff has no reason to complain, for he has all which the law military, to which he engaged to submit when he entered the service, entitles him to have. The same code creates both the right and the remedy, and this Court cannot add to the one or to the other.

The elaborate judgment of Lord Mansfield and Lord Loughborough in *Sutton* v. *Johnstone* (1), an analogous though not similar case, upholds the view I have taken on grounds which I think equally applicable to this case as to that; and although the ultimate decision in that case was based upon an independent ground, I cannot but regard it as a judgment of a high authority. As every year since that date Acts have passed for the government both of the army and of her Majesty's marine forces without any intimation of a contrary view on the part of the legislature, and so many occasions for questioning it must have occurred, and yet the judgment stands unassailed, I look upon it as one which has received the tacit assent of both the legislature and the profession. It is true that Lord Campbell, in *Dickson* v. *Lord Wilton* (2), and Cockburn, C.J., in *Dickson* v. *Lord Combermere* (3), left the question of malice to the jury, but in neither case was the point now in controversy raised. On the other hand, in *Dawkins* v. *Lord Rokeby* (4), Willes, J., ruled that the action was not maintainable. His observations in that case, which have been quoted by my Brother Mellor, I entirely adopt. For these reasons I concur with my Brother Mellor in pronouncing judgment for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *Smith & Co.*
Attorney for defendant: *The Solicitor to the Treasury.*

(1) 1 T. R. 544.
(2) 1 F. & F. 419.
(3) 3 F. & F. 527.
(4) 4 F. & F. 806.

LONGBOTTOM *v.* BERRY AND ANOTHER. 1869 Dec. 13.

Trade Fixtures—Mortgagor and Mortgagee—Machinery attached to Premises.

The owner in fee in possession of land and premises deposited the title deeds with a banking company as an equitable mortgage, to secure the balance of his account with them for the time being. He then erected a mill, and set up, not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards made a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds:—

Held, as between the mortgagees and assignee, that all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a "quasi permanent manner," by means of bolts and screws, passed to the mortgagees; and that it made no difference that the object of the annexation was merely to steady the machines when in use, and that they could be removed without any injury to them or the freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord and tenant, belong to the tenant.

Hellawell v. *Eastwood* (6 Ex. 295; 20 L. J. (Ex.) 154), and other cases, discussed.

CASE stated without pleadings, the action being brought to try the right to certain machines and other articles.

1—4. In 1862, one William Kershaw, cloth manufacturer and cloth finisher, being owner in fee in possession of certain land at Gomersal, in the West Riding of the county of York, on which were certain buildings, deposited the title deeds with a bank (of which the defendants are the trustees), as an equitable mortgage to secure the balance of his account with the bank for the time being. The bank continued to hold the deeds as such security until August, 1866.

5. After the deposit of the deeds, Kershaw built upon the land in addition to the old buildings, a large mill and other buildings, and fitted them with apparatus for generating and communicating steam power, and fitted up steam and gas pipes for heating and lighting the whole of the mill and other buildings, and furnished such part of them as he required with machinery for the purposes of his trade of a woollen cloth manufacturer, and he used and occupied all the premises as a factory for the above manufacture.

6. By a bill of sale dated the 18th of January, 1865, and duly registered under the Bills of Sale Act, Kershaw, in consideration of money advanced to him by the plaintiff, assigned to the

1869

LONGBOTTOM v. BERRY.

plaintiff (who was aware of the previous deposit of the deeds with the bank), all the machinery, fixtures, implements, utensils, effects, and things in or upon the factory named in a schedule which comprises all the machines, &c., in question in this case.

7. On the 25th of August, 1866, Kershaw, being then, and having been for some time, indebted to the bank in more than 8000*l.* on the balance of his account, which was secured by the deposit of the deeds, in consideration of the 8000*l.*, conveyed to the defendants in fee, as trustees of the bank, the land, factory, and premises, together with all the fixed machinery and fixtures.

8—10. Kershaw became bankrupt in January, 1867, and the plaintiff took possession of the machinery and articles comprised in the bill of sale without removing them, and the defendants claimed part of them under the deposit of the title deeds and subsequent mortgage; and by agreement between them all the machinery and articles in question were sold, and the money paid into the bank on the joint account of the plaintiff and defendants, subject to the determination of the Court.

11. It is conceded between the parties that the defendants have become entitled to the fee simple in the mill and premises, and to such of the machinery and fixtures as are necessarily incident thereto, or as became part of the freehold thereof when placed in or connected (as hereafter mentioned) with the premises, by the owner of the premises, he being also occupier thereof and owner of all the machinery worked therein; and that the plaintiff has become entitled to all the property in or upon the mill and premises which would not pass to a mortgagee by deposit of the deeds relating to the freehold.

12. The mills used for the purposes of the various trades carried on in the manufacturing districts of the West Riding, generally resemble each other in construction and in the manner in which the steam power is supplied, but differ in minor arrangements, and in the machines with which they are furnished, according to the particular trade which is being carried on in them for the time being. In the majority of cases, where mills are held by tenants, the land, buildings, steam engines, boilers, main shafting, and gas and steam piping, are the property of the landlord; and the tenant supplies and furnishes the mill with the species of machinery suited

for the particular trade to be carried on by him, which last mentioned machinery is, in such case, the property of the tenant. Occasionally, however, and particularly when the owner of the mill and machinery relinquishes business, mills are let furnished by the owner with machinery, and in such cases the owner, in order to rebut the presumption of ownership in the tenant, sometimes advertises in the newspapers circulating in the district, that such machinery and things as are in question in this cause belong to him and not to the tenaut for the time being in possession of the premises.

13, 14. Machinery such as is in question in this cause, is never rated to the relief of the poor, although the steam engine, boilers, and shafting, always are.

16. There is no custom of the trade in the West Riding district, that machines, such as those in question, and attached to the building in the manner hereinafter described, should go with the freehold, but on the contrary they are, save in exceptional cases, the property of the tenant, and removed by him at the expiration of his term.

17. Steam power is supplied to the mill, in which the machines and articles in question were placed, by shafting in the usual way. Shafting is of three kinds or classes, namely, main shafting, cross shafting, and counter shafting. The mode of fixing main and cross shafting usually is by having iron beams cast on the pillars of the mill, or otherwise fixed or annexed by some permanent way to the building, an iron socket is annexed to the bearer, upon this socket the shaft is placed, a metal cap is put over the shaft and screwed or bolted to the bearer. The cap keeps the shaft in its place, and the shaft cannot be removed without taking off the cap. Counter shafting is fixed in a similar way, namely, by caps screwed or bolted to bearers or hangers, which are screwed or bolted to the floor of the room above. The main shafting consists of substantial rods or bars of iron running along each room or floor of the mills, to which rods or bars a rotatory motion is communicated direct from the steam engines. Cross shafting consists of similar rods or bars, but often of a lighter description, and is fixed at right angles to the line of main shafting. The motive power is communicated from the main shafting to the cross shafting by means

1869

LONGBOTTOM v. BERRY.

of bevel-wheels, with teeth working into each other. Counter-shafting is usually much lighter than main or cross shafting, it runs parallel to one of the lines of main or cross shafting, and is worked from it by means of leather belts or bands, which being made to pass over both shafts communicate a rotatory motion from the main or cross shafts to the counter shafts. On all these rods, bars, or shafts there are broad hollow wheels called drums, and over these drums leather belts or bands are passed, which are also passed over a drum or wheel attached to each machine with which the mill is furnished, thereby communicating to it the desired motion. When the leather belts are so applied as to communicate motion to the machines, the machines are said to be in gear.

18. The following is a list of the machines and articles in question: 2 shake willeys; 1 winding machine; 4 raising gigs; 2 driving drums for gigs with pedestals; 672 gig rods; 1 wringing machine; 1 tenter-hook willey; 1 double bottom drying machine; 1 drying machine with cage for drying wool; 1 scouring machine, with iron pan or cistern used therewith; 3 pairs of spinning mules; 1 washer or washing machine; 4 pairs of fulling stocks; 4 milling or fulling machines; 1 dry brushing machine; 1 dry beating gig, teagles and rods; 4 hydraulic presses; 1 set of hand pumps to work same; 167 press plates; a large number of press papers sold at a price per lb.; 1 press steam oven; 1 screw press; 1 high pressure steam engine of 4-horse power to work presses; a hydraulic packing press, with hand pump to work same; 1 blowing machine; 1 Donisthorpe sizing machine, with drying, warping, and loom machines, and other machinery and things used therewith; 1 beaming frame; 4 iron boiling cisterns in yard; 1 large writing desk in counting house; 1 iron safe; sundry condenser bobbins; 171 iron fencings; 75 paper fencings, sold at a price per lb.; 11 clogs; counter shafting belts.

19. The above machines and articles were all (with the exception of the gig rods, press plates, press papers, loom machine, beaming frame, condenser bobbins, fencings, clogs, and straps or belts) attached to or connected with the fabric of the mill and premises in the various ways hereafter described.

20. A shake willey is a machine for detaching the different fibres of wool from each other, and then mixing or blending the same together before the wool

is carried to a machine hereinafter described, called the "tenter hook willey." The shake willey stands about six feet high, is about five feet broad, and six feet long, and weighs about fifteen hundred weight or thereabouts. One of the two shake willeys in question was attached to the fabric of the mill in the following way:— A hole having been drilled in the flags forming the floor of the mill, a bolt with a screw at the top thereof was inserted and fastened in the hole by means of melted lead, so as to leave the top of the bolt standing from one to three inches above the flags. In the feet or framework of the machine are holes large enough to admit of the bolt passing through it. When the machine was to be fixed in its place, it was lifted up and placed on the floor of the mill in such a way that the bolt should pass through the holes in the feet or framework thereof, and a nut was then screwed on to the top of the bolt, and the machine was thereby made firm and prevented from oscillating or being moved from its place when in use.

21. The other shake willey was attached to the floor of the mill, as follows:— Holes were drilled in the flags forming the floor of the mill, and the machine was placed on the floor so that certain holes in the framework, which are made for that purpose, were placed over the holes drilled in the flags, wooden pegs or wedges were then driven through the holes in the framework of the machine into the holes in the floor, until the pegs or wedges were firmly fixed, and still further, to fix the machine, a nail or iron spike was driven into each, such peg or wedge to cause it to expand and hold the more firmly. The machine could not be moved without pulling out or breaking or damaging the pegs or wedges, nor could the other shake willey be moved without unscrewing the nuts; but when the nuts were unscrewed in the one case, and the pegs or wedges pulled out or broken in the other case, the machines could be removed. This removal of the nuts could be effected in a few minutes by an unskilled workman. In consequence of the great speed at which the shake willeys run, and the uneven manner in which they are fed, it is necessary to fasten them in some way to the fabric of the building to keep them steady, and prevent them jerking or moving from their place; and the object of the fixings, as above described, was simply to insure steadiness and keep the machine in its place when working; for if these machines were not kept in their places, the belt or strap from the shaft would get slack, and then not turn the machine at the great speed required.

22. A winding-on machine is a simple apparatus for winding cloth on to rollers. It consists of an iron framework supporting a wooden roller or brush; it is about eight feet broad, four feet high, and four feet long, and weighs five hundred weight or thereabouts. It was attached to the floor of the mill by bolts and nuts, in the same manner as the shake willey first above described, and the object of its being so attached was simply to keep it steady and in its place whilst the roller revolved.

23. A gig, or raising gig, is a machine for raising the nap or surface of cloth. It is about seven feet high, seven feet broad, and four feet long, and weighs ten hundred weight or thereabouts. It was attached to the floor of the mill by bolts and nuts, in the manner hereinbefore described in regard to the first shake willey, and for the same purpose. To each pair of gigs there was driving gear, which was bolted to an iron pedestal, the pedestal being bolted in a like manner as the first shake willey to the ashlar foundation, let into the floor for that purpose.

24. A wringing machine is a machine for wringing the water out of cloth after it has been washed. It is about four feet high, two and a half feet broad, and two feet long, and weighs six hundred weight or thereabouts. It was attached to the

1869

LONGBOTTOM v. BERRY.

stonework which forms part of the floor of the mill by means of bolts and nuts, as the first shake willey described, and the sole object of fixing was to keep it steady and in its place when at work.

25. A tenter hook willey is a machine for drawing out the fibres of the wool so as to make them straight and regular. It stands about six feet high, and is three and a half feet broad, twelve feet long, and weighs one and a half ton or thereabouts. It was attached to the floor of the mill in the same manner as the shake willey, described in par. 21, save that there were no nails or iron spikes driven into the wooden pegs or wedges. In consequence of the great speed at which this machine revolves, it is necessary to fasten it to the floor or otherwise, to prevent a jerk when it is fed with the material, and to keep it steady and in its place, otherwise the strap would get slack.

26. The double balloon drying machine (which revolves over a coil of steam pipes, which is attached to the main steam pipes of the mill in order to dry the material on it), is a machine for drying webs or threads that have been warped and sized before they are woven. It is a slender apparatus, the framework of which is of wood, and one end of an iron plate or holdfast about twelve inches long, three inches broad, and one-eighth of an inch thick, was fastened by screws to the top of the framework of the machine, and the other end of the iron plate, or holdfast, was fastened by screws to the underside of the floor above. A similar iron plate or holdfast was attached in the same manner to the framework at the bottom of the machine, the other end of which was fastened by screws to a third iron plate, which iron plate or holdfast was let into and fastened by lead to the flags forming the ground floor of the mill. By taking out the screws attaching the iron plates to the framework of the machine, it could be completely detached. This machine, as made, must be attached to something before it can be worked, as it has not sufficient framework to stand by itself, whether in motion or not.

27. A drying machine is a machine or apparatus for drying wool. It consists of two parts, a fan and a drying cage. The fan is an iron box or chest which was attached to the ashlar floor of the mill by bolts and nuts, as before described, with regard to the raising gig and driving gear in par. 23. The cage is a kind of wooden trough supported on a light iron framework, and in or on the ironwork, and in or on the wirework placed on the top of this trough, the material to be dried is placed. The trough is fastened by bolts, nuts, and screws, to the framework of the fan which was fastened to the stone forming the floor of the mill as just mentioned. The fan is driven at a great speed by a belt from the shafting, and must be firmly fixed to keep it steady and from moving; neither part of this drying machine is of use without the other.

28. A scouring machine is a machine for scouring or washing wool. The scouring machine consists of two parts, the rollers and the cistern. The framework of the rollers was fastened by bolts and nuts, like the shake-willey in par. 20, the object of the fastening being, as in other cases, for the purpose of keeping it steady, and to prevent it moving when at work. The iron rod or stay was also at one end bolted with a screw and a nut, to the beam of the roof above, and at the other end with another screw and nut to the frame of the machine, so that the machine could not be moved without unscrewing the nuts of the bolts let into the stone floor, and one of the nuts of the iron rod or stay bolted to the roof and frame as aforesaid, but when such nuts were unscrewed the machine was completely detached. The cistern rested on the floor by its own weight. It has a valve, the

framework in which the valve works is riveted to the under side of the cistern; an iron pipe was fastened by nuts and bolts to the bottom of the framework of the valve in order to empty the cistern. This pipe was buried in the soil of the floor, and taken into a drain, and the framework of the valve so rivetted as aforesaid could be detached from the outlet pipe by taking out the nuts and bolts, and the cistern was then no longer connected in any way with or to the fabric of the building; but in order to get to the framework of the valve and pipe, it was necessary to remove a flag and take out soil. The cistern was supplied with water by another pipe, but such supply was not in any way attached to the cistern.

29. A spinning mule is a machine for spinning the wool which is brought to it in the half-manufactured state called "stubbing"; that is, material drawn into a thick yarn or thread. The mule is about four feet high, six feet broad, and sixty-six feet long. It consists of two parts. One part was fixed by screws to the floor, and to this part is permanently attached the head-gear, which was driven by a strap from the shaft above, and thereby gave motion to the fixed parts of the machine; and the other part was unfixed, and quite moveable. To the unfixed part there are wheels which ran upon pieces of metal called "carriage slips," firmly screwed to the floor so as to form slight tramways. By these wheels running upon the tramways the moveable part of the machine is drawn backwards and forwards to and from the other floor, and on which the stubbing had to be placed. The two parts, with the metal tramways, constitute a mule, and the motive power was communicated in this, as in all other cases, by means of a belt or band, one end of which passed over the drum fixed to the shafting of the mill, and the other passed over a wheel forming part of the head-gear of the machine, which head-gear was screwed to the floor, and also connected by bolts with that part of the machine mentioned above as also screwed to the floor. Neither part of the mule can be worked, nor is of any use, without the other. The object of the fastening part of the mule, as above described, is to ensure steadiness, and to prevent it from moving as it would do if not fastened every time the moveable part was sent against it.

30. A washer, or washing machine, is an apparatus for washing cloth after it is woven. It is about five and a half feet high, four and a half feet broad, six and a half feet long, and weighs one ton and a half, or thereabouts. The principal portion of it is an iron frame lined with wood, standing on the floor entirely by its own weight. There was, however, attached to it a lead pipe to let water into it. This pipe is two inches in diameter, and was carried by two branches through two holes in the woodwork of the machine, and the end or opening of each branch of the lead pipe was hammered out flat to the wood inside the cistern so as to expand, or form a large flange, which surrounded the hole in the wood for the space of about an inch, so that the pipe could not be drawn out without forcing up or cutting off the flange, and restoring the mouth of the pipe to its original size. The pipe was connected with the water pipes which supply the building, and these water pipes are connected with the water pipes laid under the yard and the public turnpike road, and thus communicate water from the town's mains. The pipe could also be supplied with water from a well belonging to and situate on the premises by means of another lead pipe, one inch in diameter and several feet in length, which last-mentioned pipe was, for the sake of convenience, held in its place at one point by a small iron stay or band which was fastened to the machine

1869

LONGBOTTOM v. BERRY.

by means of screws, and these screws would have to be taken out before the last-mentioned pipe could be moved.

31. Fulling stocks are machines or apparatus for rendering cloth thicker, closer, more compact and solid in substance, a quality the requirement of which results in the cloth being somewhat reduced in superficial quantity. A pair of stocks consists of two large wooden hammers, which are made to fall upon the cloth which is placed in a cistern below, saturated with water. The hammers are worked—that is, made to rise and fall—at intervals by a cast-iron cogged or tappet wheel. This wheel is about four and a half feet in diameter, there being one of such wheels to every pair of stocks. The framework of the stocks was, one side thereof, steadily held to the ashlar work forming the floor of the mill by means of bolts and screws, as described in par. 20; and, on the other side, was firmly fixed in its place by means of two wooden wedges driven in between it and the ashlar. In consequence of the great weight of the hammers the machines require to be held firmly to keep them in position, but with proper appliances they can be detached in a few minutes, all that is required being to take out the wedges and unscrew the nuts.

32. A milling or fulling mill is a machine for effecting the same purpose as is attained by the fulling stocks, but by a somewhat different mode. It is about six feet high, two and a half feet broad, eight feet long, and weighs about fifteen hundredweight, or thereabouts. It was held fast by the framework being screwed to beams about six inches square, laid just below the surface of the floor of the mill, the space between the machines and over the beams being fitted up over the level of the floor, with bricks laid in mortar. Neither the machine nor the beams to which it was screwed could be removed without displacing some of the bricks, but the beams form no part of the machines. The floor of the mill does not consist of bricks in any other part than between these particular machines, but in taking these machines away it was necessary to remove several of the bricks.

33. A dry-brushing machine is a machine for brushing cloth in a dry state, that being a necessary part of the finishing process. The machine is about seven feet high, eight feet broad, and six feet long, weighs fifteen hundredweight, or thereabouts, and was fastened to the floor in like manner as the shake willey described in par. 21. There is a long and slender cast-iron framework attached by bolts to the body of, and projecting over and beyond, this machine, and this framework is sustained and prevented from snapping off by being held up with three iron rods or stays, one end of each rod being nailed to the joists of the floor above, and the other end being bolted to the projecting framework by means of a threaded bolt passed through the end of the rod or stay, with a nut screwed thereon to hold it in its place. This machine had also one end of a steam pipe screwed thereto, the other end of the steam pipe being connected with and fastened by an ordinary screw or threaded joint to a main steam pipe laid along the floor of the mill. A condensed-water pipe of a quarter of an inch in diameter was also screwed at one end to the machine, and the other end was taken under the floor and through the wall of the building to carry away the water arising from the condensed steam.

34. A dry-beating gig is a machine for brushing cloth, and thereby loosening the nap, and is a machine of a somewhat similar nature to the dry-brushing machine described in the last preceding paragraph. The machine has also the iron

framework over it as described in the last machine, and bolted to and forming part thereof, and was held in its place by being attached with two iron rods to the roof of the building, and to the machine by nuts and bolts, in the manner described in the preceding paragraph, and the other of the parts rested by its own weight on the floor. There were also attached by screw or union joints to the machine an iron steam pipe half an inch in diameter, which was connected with the main steam pipe, and also a condensed-water pipe which was fastened to the machine by screws or union joints, and went under the floor, through the wall of the building, in the same manner as is hereinbefore described in the case of the dry-brushing machine.

1869

LONGBOTTOM v. BERRY.

35. A hydraulic pump and hydraulic presses constitute the machinery used for the pressing of cloth after it has been manufactured, so as to form an even and smooth surface upon it. The pump, which is worked by hand, is about three feet high, four feet broad, and four feet long, and the presses are each about eight feet high, four feet broad, and four feet long, and the whole of the machinery of which it is constituted weighs two tons, or thereabouts. The pump was screwed to bolts let into an ashlar stone bed on a level with the floor of the building by means of nuts. A pipe was connected with the pump by a screw or union joint, which pipe was also connected with the cylinder of each of the presses by a screw or union joint. The presses stood entirely by their own weight in holes sunk into the ground, and when the pipe from the pump, which is screwed to the cylinder of each press, was unscrewed, each press could be completely removed in detached pieces without disturbing any part of the fabric of the building. Until such pipe was unscrewed the press, of course, could not be so removed. These presses could also be worked by the steam engine. To do so it was necessary to turn a valve connected with the above pump, so that the water from the steam pump might be driven by the same pipes to the cylinder of the press.

36. In using hydraulic presses in the finishing of woollen cloth it is necessary to have, and use therewith, press plates, press papers, clogs, and fencings. Press plates are loose sheets of iron thirty-two inches long, twelve inches wide, and about a quarter of an inch thick. They are heated in the press oven hereinafter mentioned, and then placed between the different folds of cloth so as to keep the cloth warm during the time that it is being pressed in the hydraulic presses just described. There were from 100 to 200 of them used in the mill, and at the sale they were sold at a price per hundredweight. Press papers are loose sheets of strong glazed cardboard about thirty-six inches long and thirty-one inches wide. They are placed between the different folds of cloth before it is put in the press, and their use is to protect the cloth from the heated press plates, and to give a smoothness and gloss to the cloth, with the different folds of which they are compressed in the hydraulic press. There were a great number of such papers used in the mill, and they were of considerable value, and they and the press papers were sold separately from the hydraulic presses, the papers being disposed of at a price per pound.

37. The press oven is an iron box heated by steam, and its use is to put in the iron press plates to be heated before being used as before mentioned. It weighs about a ton, and stood on the floor by its own weight. It was connected by means of screws or union joints with an iron pipe, one inch in diameter, for the purpose of supplying it with steam from the boilers, and with an iron pipe, three-quarters of an inch in diameter, by which the condensed water was carried away

1869

LONGBOTTOM v. BERRY.

from the oven into the condensed-steam pipe of the small engine in the press shop hereinafter mentioned.

38. The screw press is a machine used for a similar purpose to that for which the hydraulic packing press hereinafter described is used, but is worked by hand, and consists of two wooden boards, two or three inches in thickness and about four feet square, between which the cloth is placed, and by means of an iron screw brought to bear on the upper of the two boards the boards are forced towards each other, and the cloth is compressed into a smaller and more compact bulk. The iron screw works in a hole made on a wooden plank or board, upheld at the height of about seven feet from the floor by two other boards, one on either side. This machine rested on the floor by its own weight, but in order to support the framework two small iron rods or holdfasts were inserted at one end, and bolted by a nut outside, through the wall of the building, and at the other end were attached to the machine by means of a nut and screw; by unscrewing the nuts the whole machine could be at once removed.

39. Small steam engine. In the same room where the four hydraulic presses and press oven were placed, namely the press shop, there was a small high-pressure or non-conducting steam engine of four-horse power, the ownership of which is also in question in this case. It was used for the sole purpose of working the hydraulic presses when the head pump was not used, and was fastened by nuts screwed to four bolts let down into the ashlar bed or floor, built up for the purpose, on which it stood. The steam to set it in motion being conveyed by pipes from one of the main boilers used to generate steam for the condensing-steam engines used for communicating power to the mill, which pipes were attached to the steam engine now being described by means of a flange pipe, bolted thereto by nuts and bolts. When the nut and bolts to this steam flange pipe, and the nuts to the bolts in the ashlar work were unscrewed and withdrawn, the small steam engine could be lifted off the bolts, and completely detached.

40. A hydraulic packing press and hand pump form the machinery for packing the cloth previous to its being sent away to the merchant or customer. This class of machine is not by any means invariably a part of a woollen manufacturer's machinery, but the peculiar business carried on by Kershaw, namely that of a cloth finisher and army clothier as well as a manufacturer, necessitated his sending away his cloth in a finished state to great distances, and made it desirable that he should have the means of packing it easily and effectually, and with a greater saving of time than when a common hand-screw press is only used. The pump is a hydraulic hand pump for working the packing press, and resembles the hand pump described in the 35th clause of this case, except that the pump now being described is smaller in size. The packing press is about eight feet high, six feet long, three feet broad, and weighs, with the pump, one ton or thereabouts. The packing press rested on the floor of the first storey of a building forming part of the mill premises, and was fixed or stayed by two iron rods, one of which was fastened to and through the wall of the room by a rod or stay through the wall, with a nut screwed at the end, outside of the building, and the other to the joists of the floor above, by means of bolts and nuts. The pump was bolted by bolts and nuts to the floor on which it stood, and a pipe from the pump to the press was fastened by screws or union joints. The aforesaid iron rods or stays form no part of the machine, and were used only for the purpose of keeping the machine steady while working. It is necessary that the hydraulic pumps should in all cases be

1869

LONGBOTTOM v. BERRY.

securely fixed in their places, otherwise the pipes conveying the water to the cylinder of the press would get displaced or broken. The hydraulic presses are of no use without a pump.

41. A blowing machine is a small machine or apparatus for giving a gloss to the cloth by causing steam to pass through it. This machine stands by its own weight. One end of a pipe was fastened to it by screws or union joints, the other end being screwed into the steam pipe used for supplying steam from the boilers to the room in which the machine was placed. There was also an outlet or waste pipe, one end of which was attached to the machine by screw or union joints, and the other end ran through the wall of the building into an underground drain.

42. A Donisthorpe sizing machine, and the drying, warping, and loom machines connected therewith, formed an apparatus for sizing (i.e. immersing in a glutinous liquid), and afterwards drying warps or threads before they are woven into cloth. This machine stood by its own weight on the floor of the mill. A three-quarter inch iron pipe which was screwed into one of the steam pipes of the mill was placed at a convenient point above the machine, and fastened to the wall of the mill by holdfasts, the other end of this iron pipe was screwed to the machine by a screw or union joint. Another pipe, a quarter of an inch in diameter, was screwed in the same manner to the machine and also to a condensed water pipe, which condensed water pipe was connected with a larger pipe fixed near the floor of the room, and used for carrying away condensed or waste water from the main steam engine. When the two screws, or union joints, by means of which the said two pipes were attached to the machine, were unscrewed, the machine was completely detached.

The warping machine consists of a tin cylinder in no way attached to the fabric of the building, but standing upon cast iron wheels which run up two ridges or slight tramways of metal about half an inch in diameter and five yards long, laid upon the floor of the mill, and held in position by means of small iron holdfasts, part of them driven into the stone between the flags, and others let into the flags and fastened by lead. The ridges, or tramways, stood about a quarter of an inch above the surface of the floor; their only purpose was to guide the machine when in motion and to enable it to run more smoothly; the motion given to this machine was from the shaft above by a strap.

The loom machine was in no way affixed to the freehold, but is claimed by the defendants as being appurtenant to the Donisthorpe sizing and drying machine, in connection with which it was used as a matter of convenience; the material was usually carried from one of these machines direct to the other, but there is no necessary connection between the two machines, and either of them would be available for the purpose for which it is used without the other. The above sizing, drying, warping, and loom machines were put in one lot by the auctioneers and sold together.

43. The beaming frame stood upon the floor by its own weight. It was not connected in any way with the fabric of the building, and could be at once lifted up and carried away, but for a leather band or belt which communicated motion to it from the shafting above. This belt was passed over a drum on the shafting and also over a wheel of the machine, but the wheel being surrounded by the framework of the machine the belt could not be slipped off, as in the case of the generality of machines, but must be cut or have some stitches taken out before the machine could be removed.

1869

LONGBOTTOM v. BERRY.

44. In the yard of the premises there was a double iron cistern used for steaming cloth in order to give it a lustre or gloss. This cistern was about seven feet deep, and sunk into a hole in the ground made on purpose about three feet deep, an iron steam pipe from the main steam pipe from the boilers was directed into it and reached from the top to the bottom about the middle, but was not in any way fastened to the cistern, and this pipe would have to be bent, or one length of the pipe would have to be unscrewed and detached in order to move the cistern. Without bending or detaching this pipe and removing the soil around it, it would be impossible to remove the cistern. There is also an aperture in the bottom of the cistern through which, when a valve attached to the cistern was opened, condensed water could pass into a pipe drain laid in the ground beneath the cistern.

45. In the counting house of the mill and premises was a large desk, it is about five feet long, four feet high, and four feet broad. This desk stood by its own weight. An iron gas pipe, connected by screw or union joints with the main-pipe, laid underneath the soil in the yard, was brought into the counting house through a hole cut in the wall. To this gas pipe a small lead pipe was soldered and passed through a hole cut in the side of the desk, and was screwed to the under part of a socket, above which socket was an upright standard carrying the burner, and which socket was fixed by screw to the desk. When the gas pipe was unscrewed from the socket and the lead pipe cut at its junction with the iron pipe, which was the only means of severing it, the desk was completely detached and could be removed, but without severing the gas pipe it could not be removed.

46. There was also in the counting house an iron safe; it was let into the brick wall and surrounded with bricks and mortar. In the front was a wood moulding, fastened by nails to pieces of wood driven into the wall; the safe could not be removed without pulling off the wood moulding and disturbing the brickwork.

47. Condensed boilers are used for winding the wool upon when in the partly manufactured state called slubbing. It is wound upon the bobbins when used in connection with machines called condensers, which, it is admitted, are not fixtures. The bobbins are then taken to the mills hereinbefore described, and the wool is wound off there by the mule and spun on to a coppin or bobbin, after which they (the condenser bobbins) are taken back empty to the condensers. These bobbins the defendants claim as appendages to the mules.

48. There are also certain loose articles, consisting of fencings and clogs, which are occasionally used with the said hydraulic presses, and are only of use in connection with such presses; they are, however, bought and sold separately from the presses.

49. The counter shafting is placed in various positions in the several rooms of the mill and premises, and consists of separate iron bars or shafts, which are fixed at each end, as before described in par. 17, to sockets in iron hangers, or bearers suspended from the ceiling of the rooms, but so loosely that the shafts easily revolve in the socket on their own axis, but the shafts cannot be removed from their hangers or their bearers without unscrewing and taking off the caps. Motion is communicated to the counter shafting from the main shafts, which run along the several chambers of the mill and premises as before described, by means of hollow wheels or drums on such main shafting and counter shafting respectively, over which leather belts or bands pass, and when made tight these bands communicate to the counter shafts the motion given to the main shaft.

50. The straps or belts are the leather bands above referred to as used to impar

the motion of the main shafting to the counter shafting, and of both kinds of shafting to the machinery in the mill and premises; they are generally about six inches in breadth, and are commonly bought from the curriers in undivided lengths, which are afterwards cut up by the owner of the machinery into the required lengths, the several pieces being generally rivetted together by metal rivets. The strap before being put together is passed over the drum on the shafting and over a wheel of the machine to be set in motion, and, being drawn quite tight, the two ends are stitched, rivetted, or laced together with leather, thread, or tags, or metal rivets. The straps, when so joined, can be slipped off the drum of the shaft, and then they hang loose from the shaft, from which they cannot be removed until they are cut or unloosed at the point of junction. They can be slipped off the wheels of all the machines in question in this cause (except the beaming frame) at pleasure when the machine and shafts are not in motion.

The question for the Court was, whether the plaintiff became entitled to the machines or articles, or any and which of them, under the bill of sale of the 18th of January, 1865; or whether the defendants are entitled to the possession of the said machines or articles, or any and which of them, under the deposit of title deeds and the conveyance of the 25th of August, 1866, or either of them.

April 27, 28. *Mellish, Q.C.* (*Macleod* with him), for the plaintiff. *Manisty, Q.C.* (*Macrory* with him), for the defendants.

In addition to the cases noticed in the judgment, the following cases were cited:

Parsons v. *Hind* (1); *Waterfall* v. *Penistone* (2); *Boyd* v. *Shorrock* (3); *Place* v. *Fagg* (4); *Reg* v. *Lee* (5); *Haley* v. *Hammersley* (6); *Ackroyd* v. *Mitchell* (7); and the notes to *Elwes* v. *Mawe.* (8)

Cur. adv. vult.

Dec. 13. The judgment of the Court (Lush and Hannen, JJ.) (9), was delivered by

HANNEN, J. The question in this case is, whether the plaintiff became entitled to the machines and articles enumerated in the list contained in par. 18 under his bill of sale of the 18th of

(1) 14 W. R. 860.
(2) 6 E. & B. 876; 26 L. J. (Q.B.) 100.
(3) Law Rep. 5 Eq. 72.
(4) 4 M. & R. 277.
(5) Law Rep. 1 Q. B. 241.
(6) 3 De G. F. & J. 587; 30 L. J. (Ch.) 771.
(7) 3 L. T. (N. S.) 236.
(8) 2 Sm. L. C. 5th ed. 141, 157, et seq.
(9) The judgment had been prepared by the late Mr. Justice Hayes.

1869

LONGBOTTOM v. BERRY.

January, 1865, or whether they passed to the defendants as fixtures annexed to the freehold under the equitable mortgage (which was prior to the plaintiff's bill of sale), and the subsequent conveyance to them on the 25th of August, 1866. And our opinion is in favour of the defendants as to all the articles that were really affixed to the premises, comprising nearly the whole of the enumerated articles, except a few that appear to be merely moveable goods.

Kershaw, under whom both parties claim, was owner as well as occupier of the mill and premises. He built the principal mill and fitted it with engines and machinery, as well as shafting and pipes, for the purpose of supplying and communicating steam power and gas throughout the building. And he also supplied and affixed all the machinery and articles necessary for adapting the mill for the business of a woollen manufacturer, which he carried on there. The title to the former machinery is admitted to be in the defendants, and it is only in regard to the latter, to which the enumerated articles belong, that any question is raised.

It is stated in the case that in the district, where mills are occupied by tenants, the landlord owns the former class of machinery, as well as the mills and premises, but that it is common for the tenant to supply the latter class, which in that case remains his property. But we consider this statement as altogether immaterial and irrelevant to the present case, which is not that of a tenant annexing fixtures on the property of another, but of an owner annexing them on his own property. The entire inapplicability of the peculiar law of fixtures between landlord and tenant to such a case was long since very clearly pointed out by Lord Cottenham, in the well known case of *Fisher* v. *Dixon*. (1)

The precise question here is, what are the rights of a mortgagee in the case of fixtures annexed to the freehold by the mortgagor. In the present case the mortgage was an equitable one; but no point or distinction was made on this ground; it was admitted that the plaintiff at the time of his bill of sale had notice of the defendants' mortgage, and the case was argued on the same

(1) 12 Cl. & F. 312, 328.

1869

LONGBOTTOM v. BERRY.

footing as if a mortgage had been executed before the bill of sale.

Now it appears to us to be well settled by a series of decisions, both at law and in equity, that in the case of such an annexation by the freeholder of machinery or other fixtures, the things so annexed will pass to a mortgagee with the freehold, and that this applies equally to articles which, as between landlord and tenant, would be considered as trade fixtures, as to any other articles which are really in the nature of fixtures: see *Mather* v. *Fraser* (1); *Walmsley* v. *Milne* (2), and the earlier cases in Bankruptcy and Chancery cited in the judgment of that case; *Cullwick* v. *Swindell* (3); and especially the late case of *Climie* v. *Wood.* (4)

But on the part of the plaintiff it was strongly contended, on the authority of *Hellawell* v. *Eastwood* (5), that the machines and articles now in dispute, looking to the nature of the articles, the mode of annexation, and the object and purpose of annexation, were not in truth fixtures at all, but remained mere moveable goods and chattels, which would be liable to distress, as the machines called cotton mules were held to be in that case. The grounds of decision given by the Court in that case being, that the annexation there was so slight as to admit of removal of the machines without injury to the building or themselves, and the object and purpose of annexation being, not to improve the inheritance, but to render the machines steady and more capable of convenient use as chattels. In that case the mules were affixed in the same manner as many of the machines in the present case.

But it is observable that the case was decided before any of the cases to which we have referred, and was cited in all, or most of them, but not followed in any. On the contrary, it was distinguished in *Mather* v. *Fraser* (1) by the present Lord Chancellor, then Vice-Chancellor, who observed that it was a case between landlord and tenant, and was altogether inapplicable to

(1) 2 K. & J. 536; 25 L. J. (Ch.) 361.

(2) 7 C. B. (N. S.) 115; 29 L. J. (C.P.) 97.

(3) Law Rep. 3 Eq. 249.

(4) Law Rep. 3 Ex. 257; in error, Law Rep. 4 Ex. 328.

(5) 6 Ex. 295; 20 L. J. (Ex.) 154.

1869

LONGBOTTOM v. BERRY.

the question whether machines fixed by an owner of the soil passed to a mortgagee of the freehold.

In that case, machinery fixed in the same manner as the machines in *Hellawell* v. *Eastwood* (1), were considered to pass to a mortgagee as fixtures; and so, also, in *Walmsley* v. *Milne* (2) the fact that the machinery was so fastened as to admit of severance without injury to the building or the things fixed, was also disregarded by the Court; as was also, in *Climie* v. *Wood* (3), the special additional facts found by the jury, that the object of annexation was for the more convenient use of the things fixed, and not to improve the inheritance.

In the present case the machinery in question was nearly all firmly fixed to the building, in what the Vice-Chancellor, in *Mather* v. *Fraser* (4), calls a quasi permanent manner, viz., by screws, or bolts, or soldered with lead; in most cases they were affixed to the floor, in some both to floor and roof, and in others to the side walls. This fixing was clearly necessary, for they could not otherwise be effectually used, as, for the same reason, the fixing was obviously not occasional, but permanent. It is, no doubt said in this case that the object of fixing was to insure steadiness and keep the machines in their places when worked; but the same thing could probably be said of most trade fixtures, from a steam engine downwards, and if the effect of this fixing is to cause the whole set of machines to be effectually used in the manufacture of wool and cloth, it seems very difficult to avoid coming to the conclusion that a necessary consequence is to cause the mill to be put to a more profitable use as a wool-mill than it otherwise would be; it is also equally difficult to conceive that a machine, which at all times requires to be firmly fixed to the freehold, for the purpose of being worked, could truly be said never to lose its character as a moveable chattel.

We therefore think that the case of *Hellawell* v. *Eastwood* (1) was well distinguished from cases like the present in *Mather* v. *Fraser* (4); and that all the fixed articles in this case were such

(1) 6 Ex. 295; 20 L. J. (Ex.) 154.

(2) 7 C. B. (N. S.) 115; 29 L. J. (C.P.) 97.

(3) Law Rep. 3 Ex. 257; in error, Law Rep. 4 Ex. 328.

(4) 2 K. & J. 536; 25 L. J. (Ch.) 361.

1869

LONGBOTTOM v. BERRY.

articles, in the nature of trade fixtures, as were considered by the Court of Error, in *Climie* v. *Wood* (1), to pass to the mortgagees; and that they passed here to the defendants, under their mortgage and subsequent conveyance.

The articles which we consider to be merely moveables are the washer or washing machine described in par. 30; the press plates and papers mentioned in par. 36; the loom machine mentioned in par. 42; the beaming frame mentioned in par. 43; the desk in the counting house, par. 45; the condenser bobbins, par. 47; the fencings and clogs, par. 48.

Judgment accordingly. (2)

Attorneys for plaintiff: *Johnson & Weatheralls, for Ranson, George, & Wade, Bradford.*

Attorney for defendants: *Y. Brooke, for Tennant & Rayner, Dewsbury.*

[IN THE EXCHEQUER CHAMBER.]

Nov. 30.

HUDDART *v.* RIGBY.

Pleading—New-Assignment—Evidence—Common Law Procedure Act, 1852 (15 & 16 *Vict. c.* 76), *ss.* 51, 79, 87.

In a declaration for breaking and entering certain land of the plaintiff, the abuttals of which were set out, and breaking to pieces the plaintiff's gates standing on the land, the defendant pleaded a right of way, and justified the breaking of the gates because they were across the way and obstructing it. The plaintiff joined issue. At the trial the defendant proposed to give evidence of a right of way over the plaintiff's land. The plaintiff admitted the right of way, and offered to prove that the trespasses were committed off the admitted right of way, and also that there were no gates across it, but that there were gates on that portion of the plaintiff's land which had been trespassed upon. The judge ruled that, it being admitted that a right of way existed over the land, the defendant was entitled to a verdict:—

Held (affirming the judgment of the Court of Queen's Bench), that, the plaintiff not having new-assigned, the evidence tendered by him was inadmissible.

APPEAL from the decision of the Court of Queen's Bench refusing a rule for a new trial moved on the ground of misdirection.

Declaration, that the defendant broke and entered certain land

(1) Law Rep. 4 Ex. 328.

(2) See *Ex parte Astbury*, Law Rep. 4 Ch. Ap. 630.

1869

HUDDART v. RIGBY.

of the plaintiff called the Moor Croft, otherwise the Maiden Croft, situate at Ribbleton, in the county of Lancaster, abutting, on the northerly side thereof, in part upon land of Richard Holden, and on the easterly side thereof in part upon land of Sir T. G. Hesketh, Bart., and in other part upon land used as a public cemetery by and belonging to the burial board of the borough of Preston, and broke open, damaged, broke to pieces, and destroyed the plaintiff's gates, hedges, and fences standing and being upon the land of the plaintiff, and destroyed the grass and other herbage there growing.

Plea, that at the time of the alleged trespass there was, and of right ought to have been, a common and public footpath over the land of the plaintiff for all persons to go and return on foot at all times of the year at their free will and pleasure; and the defendant, having occasion to use the way, then entered into and upon the land of the plaintiff, and along the footpath, then using the same, as he lawfully might, for the cause aforesaid, and because the gates, hedges, and fences had been erected, and then were wrongfully in and across the highway, and obstructing the same, and preventing the convenient use thereof, the defendant necessarily pulled down and destroyed the gates, hedges, and fences for the purpose of using the footpath, doing no unnecessary damage in that behalf, which are the alleged trespasses.

Joinder of issue.

At the trial before Hannen, J., at the summer assizes, 1868, held at Lancaster, the defendant's counsel proposed to give evidence of a common public footpath running east and west over the land of the plaintiff in the declaration mentioned. The plaintiff's counsel admitted such common public footpath, but offered to prove that the trespasses complained of were committed elsewhere.

The plaintiff's counsel offered to prove that there were no gates, hedges, or fences erected upon or across the admitted footpath, or obstructing the same, or preventing the convenient use thereof, but that there were such gates, hedges, and fences on the plaintiff's land across the track by which the defendant so passed, and that some of such gates, hedges, or fences were pulled down by the defendant.

Upon the admission that a common public footway did exist over the land, the learned judge ruled that the defendant, without further

evidence, was entitled to a verdict, and he accordingly directed the jury to find, and the jury did accordingly find, a verdict for the defendant.

The plaintiff applied to the Court of Queen's Bench for a rule for a new trial, on the ground that the learned judge misdirected the jury.

The Court refused a rule, on the ground that, the plaintiff not having new-assigned, the evidence was not admissible, holding that the case was governed by *Glover* v. *Dixon* (1); but the Court gave the plaintiff leave to appeal.

Gorst, for the plaintiff (*Holker*, *Q.C.*, with him). A new-assignment is not necessary. The declaration sets out the close by abbuttals, and contains an averment that the defendant destroyed the gates on the close: this is not mere aggravation, but a substantive averment. The defendant has treated it as a substantial matter, for he has pleaded a justification to the right of way, and also to breaking the gates. The replication traverses the whole plea. The right of way on these pleadings is identified as one having gates on it, and the plea could not be proved by shewing that there is another right of way without gates. A new-assignment is only necessary when there are two trespasses, or when, from the generality of the declaration, the defendant has mistaken the cause of action, which is not the case here. In *Bush* v. *Parker* (2) the declaration was for assaulting the plaintiff, and dragging him through a pond, and it was held that the dragging through the pond was a substantive trespass. In *Lane* v. *Dixon* (3) trespass was brought for breaking into a room and removing a brass plate. The removal of the brass plate was held to be, not mere aggravation, but a substantive offence. So, again, in *Phillips* v. *Howgate* (4), where the defendant pleaded a justification to breaking and entering the dwelling house of the plaintiff and assaulting him, and only proved a justification to entering the dwelling house, the Court held that the plea was not proved. So, in *Noden* v. *Johnson* (5), the same doctrine was laid down. These cases shew that the breaking

(1) 9 Ex. 158; 23 L. J. (Ex.) 12.
(2) 1 Bing. N. C. 72.
(3) 3 C. B. 776.
(4) 5 B. & A. 220.
(5) 16 Q. B. 218; 20 L. J. (Q.B.) 95.

1869

HUDDART v. RIGBY.

of the gates is substantial matter, and the defendant having pleaded a right to do these acts, cannot shew that they were done on another and different right of way elsewhere; a new-assignment is therefore unnecessary. Before the Common Law Procedure Act, 1852, the plaintiff could not have replied de injuria; but since that Act under s. 79, he may put in issue everything stated in the plea. *Glover* v. *Dixon* (1) is distinguishable, for the declaration did not set out the close by abuttals. *Bracegirdle* v. *Peacock* (2) shews that even before the Common Law Procedure Act, 1852, the plaintiff might have replied that the gates were not standing in the way. In *Ellison* v. *Isles* (3) the plaintiff was compelled to new-assign because the way had not been identified in the pleadings. In *Bond* v. *Downton* (4) the plaintiff sued in trespass for seizing his pigs. The plea stated that defendant was possessed of a close in which the pigs were eating, and were taken damage feasant. The replication stated that the defendant was not possessed of the close in which the pigs were alleged to have been eating. It was ruled that the trespass to the close having been identified, the defendant was bound to shew that he was possessed of a close in which the pigs were eating. The plaintiff could only have new-assigned under s. 87 of the Common Law Procedure Act, 1852, and would have had to state that he proceeded for causes of action different from all those which the pleas professed to justify. The plea having justified the whole declaration, and there being no other right of way with gates on it, the new-assignment would be untrue, and would not be allowed under that section.

Quain, Q.C. (*Kemplay* with him), for the defendant. The judgment of the Court of Queen's Bench is correct. Before the Common Law Procedure Act, 1852, the matter was concluded. The only question is, whether the joinder of issue in the form given in that Act makes any difference. It is said that the declaration, having alleged that there are gates in the close, identifies the close, but it no more identifies the close than if it had been alleged that there was grass in it. If to this declaration the defendant had pleaded not guilty, and the plaintiff had proved a trespass to the close, he would be entitled to a verdict, although

(1) 9 Ex. 158; 23 L. J. (Ex.) 12.
(2) 8 Q. B. 174.
(3) 11 Ad. & E. 665.
(4) 2 Ad. & E. 26.

there were no gates or fences there. The gist of every action, quare clausum fregit, is the entry on the land. *Webber* v. *Sparkes* (1) is precisely in point. Lord Abinger, C.B., there says, "The mention of posts and rails on the close does not fix the locality of the trespass; if it did, the defendant would be entitled to a verdict on not guilty;" and Parke, B., says, "The plaintiff might have traversed and new-assigned; then the question on the first issue would only have been whether there was a right of way across the close at all; if there was, and the defendants beat down the posts and rails, they would be liable on the new-assignment." The new-assignment does not amount to an admission of the facts stated in the plea: *Norman* v. *Wescombe* (2); *Robertson* v. *Gantlett.* (3) It was expressly decided in *Glover* v. *Dixon* (4) that the joinder of issue given by the Common Law Procedure Act, 1852, put in issue those facts only which the plaintiff could have traversed before the Act, and all matters which must have been pleaded by way of new-assignment, must still be pleaded. In *Bracegirdle* v. *Peacock* (5), and *Ellison* v. *Isles* (6), the plaintiff had new-assigned. The allegation as to breaking the gates, is merely aggravation: *Taylor* v. *Cole* (7); *Pratt* v. *Pratt* (8); *Pritchard* v. *Long.* (9) The cases cited on the other side on this point do not apply, for the trespass was not in respect of land. In Smith's L.C., 5th ed., p. 123, it is stated in a note to *Taylor* v. *Cole* (7), that the reporter of *Monprivatt* v. *Smith* (10), in a note to that case, cites "*Taylor* v. *Cole* (7); *Dye* v. *Leatherdale* (11); *Fisherwood* v. *Cannon* (12); *Gates* v. *Bayley* (13), and deduces from them a general principle, that "where the defendant answers what may reasonably be considered the gist of the trespass described in the declaration, it will be presumed that the action is carried on only for that which the defendant has thus attempted to justify, unless the plaintiff intimates by a new-assignment that the defendant has overlooked a part of the grievances he complains of, or has altogether mis-

(1) 10 M. & W. 485, 486, 487.
(2) 2 M. & W. 349.
(3) 16 M. & W. 289.
(4) 9 Ex. 158; 23 L. J. (Ex.) 12.
(5) 8 Q. B. 174.
(6) 11 Ad. & E. 665.
(7) 3 T. R. 292.
(8) 2 Ex. 413.
(9) 9 M. & W. 666.
(10) 2 Camp. 175.
(11) 3 Wils. 20.
(12) Cited in 3 T. R. 297.
(13) 2 Wils. 313.

(4) SC 17 Jan 1862

1869

HUDDART v. RIGBY.

apprehended his meaning." Here the gist of the trespass is the entry on the land, and the plaintiff ought to new-assign.

Holker, Q.C., was heard in reply.

KELLY, C.B. In this case we are of opinion that the judgment of the Court of Queen's Bench should be affirmed.

My Brother Willes (1) entertains some doubt on the case, and but for the high authority of Parke, B., and the decisions of *Glover* v. *Dixon* (2), and *Webber* v. *Sparkes* (3), would have thought that this case might have been otherwise decided. Were it not for the doubt entertained by my Brother Willes, I must say, speaking for myself, that this case would be entirely free from doubt.

The declaration is in the ordinary form, and alleges that the defendant broke and entered the plaintiff's land, and there broke down and destroyed certain gates and fences. If to that declaration the defendant had pleaded not guilty, to entitle the plaintiff to a verdict it would have been sufficient for him to have proved that the defendant did break and enter his land; and if it had turned out during the trial that there were no gates and fences on the land, or if there were any the defendant had not destroyed them, the plaintiff would still have been entitled to a verdict with more or less damages. But if the plaintiff had proved that there were gates on his land, and the defendant had destroyed them, the plaintiff would have been entitled to damages, not only in respect of the trespass to the land, but also in respect of the value of the gates he had destroyed. Now on this record the defendant admits the trespass complained of, but sets up as a defence that there was a right of way over the land in question, and there were certain gates and fences obstructing that way, so that by reason of the obstruction the defendant could not exercise his right, and that he therefore destroyed the gates. To this plea there was a replication taking issue on the whole plea. At the trial the plaintiff admitted a right of way across the close in question; but he offered to prove that the trespasses complained of were committed at another spot on his land within that close, and not upon any part of that portion of his land upon which he had admitted a right

(1) Willes, J., had left the court at the conclusion of the argument.

(2) 9 Ex. 158; 23 L. J. (Ex.) 12.

(3) 10 M. & W. 485.

(2) S C 17 Jun 1012

of way. Is not this the common case in which there must be a new-assignment, and in which the evidence tendered is only admissible under a new-assignment? Section 87 of the Common Law Procedure Act, 1852, allows one new-assignment, which shall be consistent with and confined by the particulars delivered in the action, and it shall state that the plaintiff proceeds for causes of action different from all those which the pleas profess to justify. In this case what the plea professed to justify, taken with the plaintiff's admission, was a right of way from A. to B., and what he proposed to establish his claim to was damages for a trespass, not upon that portion from A. to B., but upon another portion of his land. That clearly is a case for new-assignment within this section. On this part of the case *Glover* v. *Dickson* (1) and *Webber* v. *Sparkes* (2) are absolutely conclusive. It may be said that the authority of the latter case as to this point is a mere dictum of Parke, B., but its soundness has been established by *Glover* v. *Dickson*. (1) I think on the authority of these cases the plaintiff ought to have new-assigned. Then it is said that the breaking of the gates is a substantive trespass. I do not think so; it is mere aggravation which might increase the amount of damages. On these grounds we are of opinion that the judgment of the Court of Queen's Bench ought to be affirmed.

CHANNELL, PIGOTT, and CLEASBY, BB., and KEATING, J., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Plant & Abbott, Preston.*

Attorneys for defendant: *Shaw & Tremellen, for J. Forshaw, Preston.*

(1) 9 Ex. 158; 23 L. J. (Ex.) 12; 17 Jur. 1012 (2) 10 M. & W. 485.

END OF MICHAELMAS TERM, 1869.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXIII VICTORIA.

1870
Jan. 15.

THE TRUSTEES OF THE BRIGHTON, CUCKFIELD, AND WEST GRINSTED TURNPIKE ROADS, APPELLANTS; THE SURVEYORS OF HIGHWAYS OF THE PARISH OF PRESTON, RESPONDENTS.

Turnpike Road—Deficiency of Trust Fund—Rate in Aid—Apportionment—Contribution—4 & 5 Vict. c. 59.

Where the roads of a turnpike trust pass through several parishes, and the funds of the trusts applicable to the repairs of the roads are insufficient, the funds ought to be apportioned to the roads in each parish according to the amount of repairs in each parish, and not according to the mileage in each; and the deficiency thus left in each parish may be supplied by contribution out of the highway rates, under 4 & 5 Vict. c. 59, s. 1.

CASE stated by Justices under 20 & 21 Vict. c. 43.

At a special sessions for highways holden at Hove, upon an information by the clerk to the appellants, before two justices for the county of Sussex, under 4 & 5 Vict. c. 59 (1), stating that the

(1) 4 & 5 Vict. c. 59, s. 1:—"It shall be lawful for the justices at any special sessions for the highways, holden after the passing of this Act, upon information exhibited before them by the clerk or treasurer of any turnpike trust, that the funds of the trust are insufficient for the repairs of the turnpike roads

1870

TRUSTEES OF BRIGHTON ROADS v. PRESTON.

funds of the Brighton, Cuckfield, and West Grinsted Trust, applicable under the Brighton, Cuckfield, and West Grinsted Turnpike Roads Act, 1854 (17 & 18 Vict. c. cxxxvii.), by which the trustees are authorized to levy tolls upon the said roads for the repairs and maintaining of the same, were insufficient for the repair of the turnpike road within the parish of Preston, the justices ordered that the respondents should pay to the appellants the sum of 53*l.* out of the highway rates to be levied in the parish of Preston.

The 17 & 18 Vict. c. cxxxvii. s. 25, provides for the application of the tolls and other revenue of the trust, in a certain order, the sum of 850*l.* being the limit in any one year for maintaining and keeping in repair the roads. The roads of the trust are of the total length of thirty-five miles, and the length within the parish of Preston is 1 mile 38 poles.

The sum of 850*l.* authorized by the Local Act to be expended in the repairs of the roads, is at the rate of about 24*l.* 6*s.* per mile on the whole length of the roads, and such sum is wholly insufficient. The average cost of the repairs has been 1200*l.* per annum.

In no one of the parishes within which the turnpike road of the trust lies can it be kept in repair at the rate of 24*l.* 6*s.* per mile.

The estimated cost of repairs for the whole of the roads for the year ending the 31st of December, 1869, was 1350*l.*; the cost of

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within any parish, notice in writing of such intended information having been previously given on the part of such clerk or treasurer to the parish surveyor twenty-one days at least before such special sessions, to examine the state of the revenues and debts of such turnpike trusts, and to inquire into the state and condition of the repairs of the roads within the same; and also to ascertain the length of the roads, including turnpike roads within such parish, and how much of such road is turnpike road; and if after such examination it shall appear to the justices necessary or expedient for the purposes of any turnpike road so to do, then to adjudge and order what portion, if any, of the rate or assessment levied or to be levied by virtue of 5 & 6 Wm. 4, c. 50, shall be paid by the parish surveyor, and at what time or times, to the trustees or to their treasurer or other officers appointed by them; such money to be wholly laid out in the actual repairs of such part of such turnpike road as lies within the parish from which it was received."

1870

TRUSTEES OF BRIGHTON ROADS v. PRESTON.

repairing so much of the road as lies within the parish of Preston for the year amounted to 142*l.* 13*s.* 2*d.*

The portion of the turnpike road which lies within the parish of Preston has a great amount of traffic upon it, and costs considerably more to keep in repair than any other portion of the roads. There is no toll-gate in the parish of Preston, and under the Local Act the trustees are expressly prohibited from erecting a toll-gate in such parish.

The cost of keeping the roads in repair varies considerably in the several parishes.

The appellants, as trustees of the roads, at a meeting held for (amongst other purposes), that of fixing the amount to be contributed towards the repairs of the roads, out of the highway rates of the several parishes within which they lie, had decided that the 850*l.* should be credited to the several parishes within which the roads lay, in proportion to the mileage of road of the trust within each parish; and they consequently applied to the respondents to pay them out of the highway rates of the parish of Preston, the difference between the estimated cost of the repairs of such part of the turnpike road as lay within the parish, and the sum (portion of the sum of 850*l.*) which they had, upon the mileage principle, appropriated to the repairs thereof.

The respondents contended that the trustees ought to have expended the 850*l.* according to the proportion of wear and tear in each parish. There was no evidence to shew whether the 850*l.*, or any part of it, had been actually expended in proportion to mileage or in proportion to wear and tear.

Under the mileage principle, contended for by the appellants, the proportion of the 850*l.* to be spent in the parish of Preston, was 27*l.* 4*s.* 8*d.*, leaving a sum of 115*l.* to be contributed by the respondents, and this sum the appellants applied to the justices to order to be paid by the respondents.

The justices were of opinion, that whereas the estimated cost for the entire year of all the roads of the trust was 1350*l.*, of which 850*l.* was the sum to be contributed under the Local Act out of the tolls, and the excess 500*l.*, the sum to be contributed under the General Act, out of the highway rates, it was right that the two sums of 850*l.* and 500*l.* should be apportioned between the several

parishes upon one and the same principle, that, namely, in accordance with the estimated cost for the entire year of repairs in each parish, and not upon the principle of mere mileage; and as 89*l.* would be the share of the 850*l.* for which the parish of Preston would be entitled to have credit on this principle, they ordered the respondents to pay out of the highway rates of the parish of Preston the sum of 53*l.*, such sum being the difference between 89*l.* and the sum of 142*l.*, the estimated cost for the entire year of the repairs in that parish.

The question for the Court was, whether the justices' decision was correct, or whether the principle contended for by the appellants was correct.

Grantham, for the appellants, contended that the decision of the justices was erroneous, and that the 850*l.* was properly distributed among the several parishes according to mileage, and the parish of Preston ought to make up the deficiency of 115*l.* out of the highway rate.

Merrifield, for the respondents, contended that the justices were right, and that the appellants' contention, which was in effect that the 850*l.* should be apportioned according to mileage, and contribution out of the highway rate according to wear and tear could not be maintained. Both sums, that raised under the Local Act and that contributed under the General Act, ought to be apportioned upon the same principle, namely, according to cost of repairs in each parish.

COCKBURN, C.J. I am of opinion that the decision of the justices was right, and that our judgment must be for the respondents. The statute 4 & 5 Vict. c. 59, authorizes trustees of turnpike roads, where the funds of the trust are insufficient for the repair of the turnpike road in any parish, to apply to justices for a contribution out of the highway rates. The justices are empowered to adjudge and order what portion (if any) of the rates levied under 5 & 6 Wm. 4, c. 50, shall be paid by the parish to the trustees, such money to be wholly laid out in actual repairs of the road in the parish. The circumstances of the case itself shew that an apportionment on the mileage principle is wrong, and the mode of applying the rate in aid was equitable and just. The

1870

TRUSTEES OF BRIGHTON ROADS v. PRESTON.

appellants' trust comprised several parishes, and the traffic on the roads passing through them was greater on some roads than on others; in some parishes, therefore, it is obvious that a much larger expenditure in proportion would be necessary than in others. Now, if the trust fund levied on the whole district were adequate, in what proportion would it be applied? Manifestly, according to the cost of repairs in each parish. The fund is insufficient; how, then, ought it to be applied? I think, as far as it will go, on the same principle. Suppose that the cost of repairs in parish A. is 100*l.* and in parish B. 50*l.*, and the fund which the trustees have in hand is insufficient to cover the whole, it ought nevertheless to be expended in the same proportion as it would have been if it had been sufficient. Justice and equity require that the fund should be apportioned amongst the parishes not according to mileage, but according to the actual cost of repairs in each parish; that is the true principle. The justices were therefore right, before making an order for a contribution out of the highway rate, to require that the fund should be expended according to the cost of repairs in each parish.

MELLOR, J. I entirely concur in the opinion expressed by the Lord Chief Justice.

HANNEN, J. I have felt some little difficulty in the course of the argument. But I agree with my Lord and my Brother Mellor, if it had been intended that the apportionment should be made upon the mileage principle, the legislature would, I think, have said so. I think something more was contemplated than a mere computation of mileage.

Judgment for the respondents.

Attorneys for appellants: *Prior & Bigg, for Waugh, Cuckfield.*

Attorneys for respondents: *Hore, for Cooper, Williams, & Greaves, Brighton.*

THOMAS, APPELLANT; ALSOP, RESPONDENT.

1870
Jan. 19.

Poor—Husband and Wife—Relief to Wife without Husband—Order on Husband towards Wife's Maintenance, under 31 *&* 32 *Vict. c.* 122, *s.* 33—*Offer of Husband to maintain Wife at his House.*

By 31 & 32 Vict. c. 122, s. 33, when a married woman requires relief without her husband, the guardians of the union or parish to which she becomes chargeable may apply to justices in petty sessions, and the justices may summon the husband to appear before them to shew cause why an order should not be made upon him to maintain his wife; and upon his appearance, or on proof of service of the summons, they may, after hearing the wife, or on such other evidence as they may deem sufficient, make an order upon him to pay such sum weekly towards the cost of the relief of the wife as, after consideration of all the circumstances of the case, shall appear to them proper.

A man having been summoned under the above section, it appeared that his wife had left him sixteen years before on account of his ill-usage, from the effects of which she was still suffering; and she had lately received parish relief, and was still chargeable. The husband had not contributed to her support during the separation, but had applied to her to return to cohabitation. At the hearing he offered to receive her back at his house, and promised not to ill-use her. But she refused to return on account of the brutality she had previously received. The justices were satisfied by evidence that it was dangerous to the health of the wife to return to cohabitation; and they made an order on the husband to pay a weekly sum towards the relief of the wife:—

Held, that the order was rightly made, notwithstanding the husband's offer, as the justices had found, in effect (which was a question for them), that the wife was justified in leaving and refusing to return to the husband's house.

CASE stated by Justices under 20 & 21 Vict. c. 43.

At a petty sessions holden at Newton Abbot, in the county of Devon, on the 27th of July, 1869, the appellant was summoned, on a complaint by the respondent, clerk to the guardians of the Newton Abbot Union, under s. 33 of 31 & 32 Vict. c. 122 (1), to

(1) 31 & 32 Vict. c. 122, s. 33:—"When a married woman requires relief without her husband, the guardians of the union or parish, or the overseers of the parish, as the case may be, to which she becomes chargeable, may apply to the justices having jurisdiction in such union or parish, in petty sessions assembled, and thereupon such justices may summon such husband to appear before them to shew cause why an order should not be made upon him to support his wife; and upon his appearance, or, in the event of his not appearing, upon proof of service of such summons upon him, such justices may, after hearing such wife upon oath, or receiving such other evidence as they may deem sufficient, make an order upon him to pay such sum, weekly or otherwise, towards the cost of the relief of the wife as, after consideration of all.

1870

THOMAS v. ALSOP.

shew cause why an order should not be made upon him to maintain his wife, Thirza Thomas, being a married woman, and requiring relief without her husband, and then chargeable to the said union.

Upon the hearing of the complaint both appellant and respondent were personally present, and also appeared by their attorneys.

It was proved on the part of the respondent that Thirza Thomas was married to the appellant on the 7th of August, 1835. She lived with him from the date of marriage to the 17th of March, 1853, when, in consequence of the ill-usage she received from the appellant, she left his house, and lived separate from him, and she was, at the time of the hearing, suffering from the injury she had received from the appellant prior to her separation. She was suffering from uterine disease, from which she had suffered for sixteen years, and after such a long continuance it was now incurable.

The appellant had not contributed to the support of his wife during the separation, but had applied to her to return to cohabitation.

Since the separation Thirza Thomas had exhausted what little means she had, and had been supported by her friends. Her health was bad, her sight not good, and she was now wholly unable to maintain herself, and she required relief; and whilst residing in the parish of Ashburton, within the Newton Abbot Union, she became chargeable to the common fund of the union on the 6th of July, 1869, and was, at the time of the hearing, an inmate of the Newton Abbot Union House, and still chargeable thereto.

The appellant, at the hearing, through his attorney, offered to receive back his wife at his house, and provide for her. She declined to return to the appellant from the brutality she had previously received from him; and medical evidence was called,

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the circumstances of the case, shall appear to them to be proper, and shall determine in such order how and to whom the payments shall from time to time be made, which order shall, if the payments required by it to be made be in arrear, be enforced in the manner prescribed by the Act of 11 & 12 Vict. c. 43, for the enforcing of orders of justices requiring the payment of a sum of money: Provided that such order may be at any future time revoked by the justices in petty sessions assembled if they see sufficient cause for so doing."

1870

THOMAS v. ALSOP.

and it was proved to the satisfaction of the justices that it would be injurious to the health of Thirza Thomas to return to cohabitation with the appellant.

It was contended on the part of the appellant that as Thirza Thomas had, on oath, in the presence of the court, refused to return back to cohabitation with the appellant, who then again offered a home, and made promise not to ill-use her, the justices had no jurisdiction, and were debarred from making any order on the appellant after such refusal; and the appellant relied on the case of *Flannagan* v. *Bishopwearmouth* (1), which was a case stated on 5 Geo. 4, c. 83, s. 3 (the Vagrant Act), in support of his argument; and argued that, by such refusal to return, Thirza Thomas had no further claim on the appellant, and no payment could be required of the appellant after such declaration of Thirza Thomas.

The justices were of opinion that s. 33 of 31 & 32 Vict. c. 122, was not affected by the above decision, but provided expressly for cases to which that decision would have previously been applicable; and that, consequently, they had power to make an order on the appellant under the above 33rd section, and they accordingly made an order on the appellant to pay to the relieving officer of the union 7*s.* a week towards the maintenance of his wife, so long as she should require relief, or until the order was revoked.

The question of law for the opinion of the Court was, whether the justices had jurisdiction to make such an order after the appellant had offered to receive and provide for his wife in manner before stated.

McKellar, for the appellant. After the offer and readiness of the appellant to receive back and support his wife, the justices had no power to make an order upon him to contribute to her maintenance: *Flannagan* v. *Bishopwearmouth.* (1)

[LUSH, J. That was a decision under 5 Geo. 4, c. 83, that a man, whatever his past misconduct, could not be convicted of wilfully refusing to support his wife if he was ready to maintain her. The present enactment is very different.]

If the husband is ready to support her, she is not "chargeable" to the parish or union.

(1) 8 E. & B. 451; 27 L. J. (M. C.) 46.

1870

THOMAS v. ALSOP.

[COCKBURN, C.J. It is the parish, not the wife, who make the present application; the parish are bound to give relief if the woman "requires it."]

She is not legally "chargeable" if she has a home to return to, or other means of support: see 4 Burn's Just. 299; *Rex* v. *Flintan* (1); *Sweeney* v. *Spooner*. (2) In *Cargill* v. *Cargill* (3) it is said by the Judge Ordinary, that a magistrate would not be justified in making an order, under 20 & 21 Vict. c. 85, s. 21, to protect a wife's property after she has been deserted by her husband, unless the desertion continues up to the time of applying for the order. So here a woman cannot require relief, or be chargeable to the parish, if the husband is ready to afford her a home.

M. Bere, Q.C., for the respondent, was not heard.

COCKBURN, C.J. I am of opinion that the order should be affirmed. The present statute differs most essentially from that under which *Flannagan* v. *Bishopwearmouth* (4) was decided. Under the 5 Geo. 4, c. 83, a man was punishable who wilfully neglected or refused to provide for his wife. In the present statute, by s. 33, it is enacted:—[The Chief Justice read the section.] This enactment is altogether different in scope and effect from the other, and the decision on the one Act can have no bearing on the other. The only difficulty arises from the peculiar state of the facts. The wife, sixteen years ago, left her husband in consequence of his violence and personal ill-usage of her; and no one can doubt that she was justified in leaving his house, and she is not bound to return to it unless she is satisfied that she is not likely again to be subject to the same usage. She is not bound to condone her husband's misconduct, unless she thinks it right and safe to do so. Under these circumstances she requires parish relief, and the parish or union seek to have an order made upon the husband to contribute towards this relief. The husband appears upon the summons, and says: "I am ready and willing to take back my wife, and I am of ability to maintain her when she returns. I therefore object to the magistrates making any order." The magis-

(1) 1 B. & Ad. 227.
(2) 3 B. & S. 329; 32 L. J. (M. C.) 82.
(3) 1 Sw. & Ty. 235; 27 L. J. (P. & M.) 69.
(4) 8 E. & B. 451; 27 L. J. (M. C.) 46.

1870

THOMAS v. ALSOP.

trates do not ask us whether they were right in deciding that the wife was justified in leaving and refusing to return to her husband. They only ask whether the offer on the husband's part ousted them of jurisdiction. I am of opinion that it did not. It was for the magistrates to determine whether or not, under the circumstances, the wife was bound to return. If a wife has left her husband under circumstances which justified her in leaving, the husband is bound to maintain her, and that not in the conjugal dwelling, and she is entitled to pledge his credit for necessaries, and it is no answer that the husband is ready to receive her back. Therefore, in the present case, the wife did "require relief," if the facts were such as to warrant her refusal to return to cohabitation. The justices were the sole judges of this; they have found, as a fact, that it was dangerous for her to return (whether I should have come to the same conclusion it is unnecessary to consider, it is enough to say that the justices have so found), and the only question for us is, whether the offer on the part of the husband gets rid of his liability to have an order made upon him, and I do not think it does. It would be most dangerous to hold otherwise; as the consequence would be that a husband, when called upon to maintain his wife, would only have to say he was ready to maintain her to get rid of the summons, and the wife must either return to him or starve. The words of the section are quite large enough to give jurisdiction to magistrates to make an order in a case like the present; and it would be injurious if it were not competent to magistrates to make an order, notwithstanding the offer of the husband to receive back his wife had been made.

MELLOR, J. I also think the magistrates had jurisdiction, though certainly some of the facts want explanation to make their decision on the merits altogether satisfactory to my mind. The justices seem to have thought the wife justified in refusing to return to her husband; and under those circumstances the husband is liable to support her away from his home; and this liability may be enforced in various ways. If he wilfully refuses to support her he might be convicted under the Vagrant Act; but the case cited, *Flannagan* v. *Bishopwearmouth* (1), shews that an offer to maintain her at his home

(1) 8 E. & B. 451; 27 L. J. (M. C.) 46.

1870

THOMAS v. ALSOP.

would prevent a conviction under that statute. That decision, however, does not govern the present case. The statute here in question is in very different language. [The learned Judge read s. 33]. Now the wife does "require relief," and does become "chargeable," in one sense, when she is in want of money; and her being "chargeable" gives jurisdiction to the justices to summon the husband to shew cause why he should not contribute to her maintenance; the cause which he shews is, that he is ready to receive and maintain her at his own house. But she refuses to return on the ground of his violence, and the justices have found this refusal well founded. Is the justices' jurisdiction to make an order gone? I think not. The words of the statute are quite wide enough to include such a case, and we are not precluded by authority from deciding that the magistrates may, in their discretion, on the facts before them, disregard the offer, and make an order on the husband notwithstanding.

LUSH, J. I am entirely of the same opinion, that the magistrates, under the circumstances detailed in this case, might make an order on the husband under s. 33, notwithstanding his offer to receive back and maintain his wife. The case is quite distinguishable from *Flannagan* v. *Bishopwearmouth* (1), decided under the Vagrant Act; that statute was passed for a different purpose, and is in very different language from the present. I understand the justices to have come to the conclusion, that the wife refused to return to her husband on the well-founded apprehension of further violence, and that it would have been injurious to her health for her to return. That being so, she had a right to throw herself upon the parish, and thereby became chargeable. This is the very state of circumstances which the section seems intended to provide for; the justices may order such sum to be paid to the parish officer as they, on consideration of all the circumstances of the case, may think proper.

Judgment for the respondent.

Attorneys for appellant: *Vizard, Crowder, & Co., for Square, Plymouth.*

Attorneys for respondent: *Church, Sons, & Clarke, for Francis & Baker, Newton Abbot.*

(1) 8 E. & B. 451; 27 L. J. (M. C.) 46.

THE NORTH EASTERN RAILWAY COMPANY, APPELLANTS; THE LOCAL BOARD OF LEADGATE, RESPONDENTS. 1870 *Jan.* 26.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *s.* 55—*Rating of Land "used only as a Railway constructed under the Powers of an Act of Parliament for Public Conveyance."*

A railway, originally constructed without any parliamentary powers, and afterwards sold to a railway company under an Act of Parliament, and enlarged and used for public traffic under the provisions of that Act, and of the General Statutes for regulating railways, does not come within the meaning of s. 55 of the Local Government Act, 1858, of "land used only as a railway constructed under the powers of any Act of Parliament for public conveyance;" and is therefore rateable to a general district rate in the full net annual value.

CASE stated under 12 & 13 Vict. c. 45, on an appeal by the North Eastern Railway Company to the Durham quarter sessions, against an assessment for a general district rate, made on the 27th of December, 1867, by the Local Board for the district of Leadgate, under the Local Government Act, 1858 (21 & 22 Vict. c. 98).

In the year 1834, by deed of settlement dated the 3rd of February, 1834, a company called the Stanhope and Tyne Railroad Company was established for the purpose of working certain limestone quarries near Stanhope, in the county of Durham, and certain coal mines in the parish of Lanchester, in the same county, called the Pontop and Medomsley Collieries, and for the carriage of coals, limestone, and other articles of merchandise, along a railway then in course of formation by the company, and called the Stanhope and Tyne Railroad.

The line of the railway commenced at certain lime quarries in the parish of Stanhope, and passed through a point called the Carr House at Pontop, and from thence to the river Tyne in the town of South Shields; the whole length of the line being thirty-five miles or thereabouts.

In the year 1834 the Stanhope and Tyne Railroad Company completed the construction of their railroad, and it was opened for use in the month of September in that year. The company had no powers conferred upon them by Act of Parliament to enable them to construct the railway, and it was not by virtue of any powers conferred by Act of Parliament that the railway was con-

1870

NORTH EASTERN RAILWAY CO. v. LEADGATE LOCAL BOARD.

structed. The land upon which the railway was constructed was not the property of the company, and the company did not obtain, by purchase or otherwise, the property in the land, nor had the company any right or title to use the same except as hereinafter mentioned. The company, before and at the time of the construction of the railway, entered into agreements with the owners of land upon which the railway was constructed, by which agreements, in consideration of half-yearly payments made by the company to the owners, the company obtained leave to use, on certain terms and for certain periods, the land for the purposes of the railway. The whole of the railway was constructed upon lands which the company obtained leave to use by virtue of such agreements, except a portion within the district of Leadgate, which was constructed upon what was then and is used as a public highway.

The Stanhope and Tyne Railroad Company, which, besides the railway, also constructed staiths, with suitable machinery for loading and unloading vessels in the river Tyne, used the line of railway for the purposes aforesaid, and also for the conveyance of passengers and goods from the month of September, 1834, down to the year 1839. In the latter year the company ceased to use that portion of the railway which lay between Stanhope and Carr House, being a distance of eleven miles or thereabouts (herein called "the upper part of the railway"), but down to the year 1842 continued to use that portion of the railway which lay between Carr House and the river Tyne (herein called "the lower part of the railway").

On the 5th of February, 1841, the company, having become embarrassed, was dissolved under the powers of their deed of settlement, and on the 13th of May, 1842, an Act was passed (5 Vict. sess. 2, c. xxvii.), by which (s. 6) the "upper part of the railway" was vested in the Pontop and South Shields Railway Company, and by s. 143 that company were enabled to purchase the land over which the railway passed; by ss. 176—185 the company were empowered to levy tolls; and by s. 248, nothing in the Act was to exempt "the lower part of the railway" from the provisions of any general Act of Parliament passed during the then or any future session of Parliament.

In 1844 another Act (7 Vict. c. xxvi.) was passed, empowering

(inter alia) the South Shields Railway Company to widen a part of the railway, and purchase land for the purpose; in pursuance of the two Acts (5 Vict. sess. 2, c. xxvii. and 7 Vict. c. xxvi.) the Pontop and South Shields Railway Company, from 1842 to 1846, kept open and widened "the lower part of the railway."

By 9 & 10 Vict. c. cccxxx. ss. 12 and 14, "the lower part of the railway" was vested in the Newcastle and Darlington Junction Railway Company; under other Acts the name of the Newcastle and Darlington Railway Company ultimately was changed to the North Eastern Railway Company, and all the interest in the railways, &c., vested in the appellants.

From the passing of 5 Vict. sess. 2, c. xxvii., up to the present time, "the lower part of the railway" has been worked and used for public traffic under the provisions of that and the several other Acts, and subject to such provisions of the General Statutes for regulating railways as are applicable thereto.

Under 5 Vict. sess. 2, c. xxvii., "the upper part of the railway" was sold to Joseph Pease, and in 1847, under 10 & 11 Vict. c. ccxcii., was vested in the Wear Valley Railway Company, and leased to the Stockton and Darlington Railway Company in 1854; by the Stockton and Darlington Railway Act, 1854 (17 & 18 Vict. c. cxxviii.), incorporating the General Statutes, that company were empowered to purchase the land over which the railway passed; and by the Stockton and Darlington Amalgamation Act, 1858 (21 & 22 Vict. c. cxvi.), the railway was vested in them; and by the North Eastern and Stockton and Darlington Railway Amalgamation Act, 1863 (26 & 27 Vict. c. cxxii. s. 5), was vested in the appellants.

From the passing, in 1842, of 10 & 11 Vict. c. ccxcii., up to the present time, "the upper part of the railway" has been worked and used for public traffic under the provisions of that Act, and the several other Acts relating thereto, and subject to such provisions of the General Statutes for regulating railways as are applicable thereto.

In 1866 the Local Government Act, 1858, was adopted in the district of Leadgate; and on the 27th of December, 1867, the local board of the district made an assessment for a general district rate upon the several occupiers.

Parts of "the upper part of the railway" and of "the lower

1870

NORTH EASTERN RAILWAY CO. v. LEADGATE LOCAL BOARD.

part of the railway," and used only as railways, are within the district.

Under the powers of the Acts before mentioned, the lands, upon which "the upper part of the railway" was constructed by virtue of wayleaves, have by various purchases become vested in the appellants; and these lands are used exclusively for the purpose of the railway.

Parts of the land over which "the lower part of the railway" passes in the district is the property of the appellants. The remainder of such land (with the exception of a part which forms part of a highway) is held by the appellants under leases or agreements for wayleaves which have been from time to time renewed.

Since the time when "the upper part of the railway" and "the lower part of the railway" became vested in the Wear Valley Railway Company and the appellants respectively, the Wear Valley Railway Company, the Stockton and Darlington Railway Company and the appellants respectively, have expended large sums in widening, levelling, repairing, and improving the same.

In the above assessment the appellants were assessed in respect of the parts of "the upper part of the railway" and of "the lower part of the railway" within the district, and used only as railways, upon the full net annual value thereof.

The appellants contend that they are liable to be assessed in the proportion of one-fourth only of the net annual value, by virtue of a clause in s. 55 of the Local Government Act, 1858 (21 & 22 Vict. c. 98), which enacts that . . . "the occupier of any *land* covered with water, or *used only* as a canal or towing-path for the same, or *as a railway constructed under the powers of any Act of Parliament for public conveyance*, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

The question for the Court was whether the appellants were liable to be rated, in respect of the above parts of the railway, in the full net annual value, or in the proportion of one-fourth part only.

Mellish, Q.C. (with him *Kemplay*), for the appellants. This rail-

way, although originally constructed without parliamentary powers, is, to all intents and purposes, constructed under an Act of Parliament, as it was purchased and enlarged and improved under the power of the Acts under which it ultimately became vested in the appellants. Moreover, if the railway cannot be said to be constructed under the powers of an Act of Parliament, it is, at all events, used as a railway constructed under the powers of an Act of Parliament; that is, used in the same way as a railway constructed under the powers of an Act of Parliament; and it comes, therefore, within the exact words of s. 55 of 21 & 22 Vict. c. 98.

Manisty, Q.C. (with him *G. Bruce*), for the respondents. The meaning of the section is clearly that, in order to come within the lesser rateability, the railway must not only be used, but must have been also constructed under the powers of an Act of Parliament; whereas this railway was constructed by a private company without any parliamentary powers.

COCKBURN, C.J. I cannot suppose that the legislature would intentionally have drawn any distinction between a railway originally constructed by a private company and afterwards brought within the provisions of an Act of Parliament and used as a railway for public conveyance, and a railway constructed under the powers of an Act of Parliament in the first instance; and I regret that I cannot see my way to putting such a construction upon s. 55 as would meet the equity of the case, and include a railway like the present, though I have no doubt the legislature would have drawn the clause so as to embrace the present case, had such a case been present to their minds. Mr. Mellish contended that "used as a railway constructed under the powers of an Act of Parliament for public conveyance," might mean, used as a railway is used which has been constructed under the powers of an Act of Parliament; but that would in effect be to construe the statute as if "constructed" were not there. The present railway is used as a railway under the powers of an Act of Parliament; but it was not constructed under the powers of an Act of Parliament; and the awkward word "constructed" is there, and I do not think we can reject it. The clause must mean, used as a railway, which railway has been constructed under the powers of an Act of

1870

NORTH EASTERN RAILWAY CO. v LEADGATE LOCAL BOARD.

Parliament. All the words must have effect given to them: "used" is put in in order to exclude a railway, if falling into disuse after it has been constructed. I cannot say, therefore, that the words mean, used in the same way as a railway constructed under the powers of an Act of Parliament; they can only mean, used as a railway, which railway has been so constructed. I dare say that was not what the legislature meant, but we can only look at the words as they stand.

MELLOR, J. I have not been free from doubt; but on further reflection I feel that I cannot read the section as Mr. Mellish proposes without rejecting some of the words or introducing other words.

LUSH, J. I share in the regret expressed by the Lord Chief Justice. We can only collect the intention of the legislature from the language they have employed, and we must put a reasonable sense on every word used. The section imposes two conditions: that the land shall be used only as a railway, and the railway shall have been constructed under the powers of an Act of Parliament. And I do not think we can construe it as Mr. Mellish proposes without straining the language.

Judgment for the respondents.

Attorneys for appellants: *Williamson, Hill, & Co.*
Attorneys for respondents: *Pattison, Wigg, & Co.*

ALLEN, Appellant; WORTHY, Respondent.

1870
Jan. 15.

Vaccination—Second Information—Previous Conviction—Certificate that the Child is not in a fit state to be successfully Vaccinated—30 & 31 *Vict. c.* 84, *ss.* 18, 31, 34.

By 30 & 31 Vict. c. 84, s. 31, "if information be given to a justice that a child under the age of fourteen years has not been successfully vaccinated, and that notice has been given to the parent of the child to procure its being vaccinated, and has been disregarded, the justice may summon such parent to appear with the child before him, and if the justice shall find, upon examination, that the child has not been vaccinated, nor has had the smallpox, he may, if he see fit, make an order directing the child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been vaccinated, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can shew some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings":—

Held, that a parent, having been fined under this section for disobeying an order to have his child vaccinated, may be proceeded against from time to time as long as the child remains unvaccinated.

By s. 34, in any prosecution for neglect to procure the vaccination of a child, . . . if the defendant produce the certificate in the form B., it shall be a sufficient defence, except when the time specified therein for the postponement of the vaccination shall have expired before the time when the information shall have been laid:—

Held, that the certificate was no answer to proceedings under s. 31.

Case stated by Justices under 20 & 21 Vict. c. 43.

On the 8th of May, 1869, an information was laid by the respondent, the registrar of births and deaths, under s. 31 of 30 & 31 Vict. c. 84 (1), before a justice of the peace, at St. Neot's,

(1) The following sections are material:—

30 & 31 Vict. c. 84, s. 15:—"The registrar of births shall, on or within seven days after the registration with him of the birth of any child not already vaccinated, give a notice according to the form in the schedule hereto annexed, marked A., or to the like effect, to the parent, or, in the event of the death, illness, or inability of the parent, to the person having the custody of such child, if known to him, requiring such child to be duly vaccinated according to the provisions of this Act, and specifying the days, hours, and places where the public vaccinator of the vaccination district wherein such child resides, or the vaccinator of any station duly authorized by the Lords of Her Majesty's Council, will attend for the purpose of performing the operation, to which notice forms according to those in the said schedule marked B., C., and D., and also the address of the registrar

1870

ALLEN v. WORTHY.

in the county of Huntingdon, that the appellant, within the space of six calendar months, did disobey a certain order made by W. Humbley, one of the justices of the peace for the county, dated

giving the notice, shall be attached in such form as the registrar-general shall deem most convenient."

s. 16:—"The parent of every child born in England shall, within three months after the birth of such child, or where, by reason of the death, illness, absence, or inability of the parent, or other cause, any other person shall have the custody of such child, such person shall, within three months after receiving the custody of such child, take it, or cause it to be taken, to the public vaccinator of the vaccination district in which it shall be then resident, according to the provisions of this or any other Act, to be vaccinated, or shall, within such period as aforesaid, cause it to be vaccinated by some medical practitioner; and the public vaccinator to whom such child shall be so brought is hereby required, with all reasonable despatch, subject to the conditions hereinafter mentioned, to vaccinate such child."

s. 18:—"If any public vaccinator or medical practitioner shall be of opinion that the child is not in a fit and proper state to be successfully vaccinated, he shall forthwith deliver to the parent or other person having the custody of such child a certificate under his hand, according to the form in the schedule hereto annexed, marked B., or to the like effect, that the child is then in a state unfit for successful vaccination, which certificate shall remain in force for two months, and shall be renewable for successive periods of two months until a public vaccinator or medical practitioner shall deem the child to be in a fit state for successful vaccination, when the child shall, with all reasonable despatch, be vaccinated, and the certificate of successful vaccination duly given, if warranted by the result."

s. 29:—"Every parent or person having the custody of a child who shall neglect to take such child, or to cause it to be taken, to be vaccinated, or, after vaccination, to be inspected, according to the provisions of this Act, and shall not render a reasonable excuse for his neglect, shall be guilty of an offence, and be liable to be proceeded against summarily, and, upon conviction, to pay a penalty not exceeding twenty shillings."

s. 31:—"If any registrar, or any officer appointed by the guardians to enforce the provisions of this Act, shall give information, in writing, to a justice of the peace that he has reason to believe that any child under the age of fourteen years, being within the union or parish for which the informant acts, has not been successfully vaccinated, and that he has given notice to the parent or person having the custody of such child to procure its being vaccinated, and that this notice has been disregarded, the justice may summon such parent or person to appear with the child before him at a certain time and place, and upon the appearance, if the justice shall find, after such examination as he shall deem necessary, that the child has not been vaccinated, nor has already had the smallpox, he may, if he see fit, make an order under his hand and seal directing such child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been so vaccinated, or shall not be shewn to be then

1870

ALLEN v. WORTHY.

the 29th of April, 1869, whereby the appellant was ordered to have Eliza Allen, under the age of fourteen years, and the legitimate child of the appellant, vaccinated within seven days from the date of the order, contrary to the form of the statute.

The justice accordingly issued a summons to the appellant to appear at the petty sessions at St. Neot's on May 13.

At the hearing before the justices, it was proved that the order mentioned in the information had been made, and that the appellant had neglected to obey it; and it was admitted that the child had not, at the time of the hearing, been vaccinated.

The appellant then stated, and the fact was admitted by the respondent, that the appellant had previously, on the 30th of March, 1869, been convicted of disobeying an order dated the 11th of March, 1869, whereby the appellant had been ordered to cause Eliza Allen to be vaccinated within seven days from that order.

It was contended, on behalf of the appellant, that the information now laid against him was for the same offence; and that, therefore, the appellant could not be again convicted; and stress was laid on the concluding words in the judgment of Cockburn, C.J., in *Pilcher* v. *Stafford*. (1)

The justices, however, considered that their jurisdiction under s. 31 of the Vaccination Act, 1867 (30 & 31 Vict. c. 84), was not limited to making but one order directing a child under fourteen

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unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can shew some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings. . . . "

s. 34:—"In any prosecution for neglect to procure the vaccination of a child, it shall not be necessary in support thereof to prove that the defendant had received notice from the registrar, or any other officer, of the requirements of the law in this respect; but if the defendant produce any such certificate as hereinbefore described, or the register of vaccinations kept by the registrar as hereinbefore provided, in which the certificate of successful vaccination of such child shall be duly entered, the same shall be a sufficient defence for him, except in regard to the certificate marked B., when the time specified therein for the postponement of the vaccination shall have expired before the time when the information shall have been laid."

(1) 4 B. & S. 775; 33 L. J. (M. C.) 113.

1870

ALLEN v. WORTHY.

years of age to be vaccinated, and that the neglect to obey each order formed a separate offence punishable on conviction, and that the conviction for disobeying a previous order was no previous conviction of the offence charged in the information; and that, consequently the case was in no way governed by the decision in *Pilcher* v. *Stafford* (1); and that s. 31 of the Vaccination Act, 1867, appeared to them to have been inserted in that Act with the object of avoiding the mischief found to exist when *Pilcher* v. *Stafford* (1) was decided.

The appellant contended that Eliza Allen was then, and since the 20th of April then last past had been, in an unfit state for vaccination; and in support of his contention produced a certificate in the form B. given in sched. of 30 & 31 Vict. c. 84, dated the 20th of April, 1869. And it was contended on behalf of the appellant, that the justices were bound by the terms of 30 & 31 Vict. c. 84, s. 34, to accept such certificate as proof that the child was then unfit to be vaccinated, and that the production of such certificate was reasonable ground for the omission of the appellant to carry the order of the 29th of April into effect.

The justices drew attention to the fact that such certificate was dated on a day prior to the date of the order of the 29th of April, 1869, and it was admitted that the same certificate had been produced when that order was made, but the justice making the order had refused to attach any weight to the certificate, on the ground that the practitioner by whom it purported to have been signed was opposed to the operation of vaccination generally, as had been stated by the appellant on a previous occasion, and such practitioner had signed a certificate under 30 & 31 Vict. c. 84, and which had been on such previous occasion produced in court, stating that Eliza Allen ought never to be vaccinated; that the reproduction of the certificate of the 20th of April, 1869, which had been refused by the justices making the order of the 29th of April, 1869, formed under such circumstances no reasonable ground for the omission of the appellant; and the justices adjudged him to pay a penalty of 7*s.* and costs.

The questions for the Court were, first, whether the conviction of the appellant on the 30th of March, 1869, was a sufficient

(1) 4 B. & S. 775; 33 L. J. (M. C.) 113.

defence to the information of the 8th of May, 1869; secondly, whether the production of the medical certificate in the form B., was a sufficient answer to the information of the 8th of May, 1869.

Graham, for the appellant. There are two questions; first, whether an order having been made by justices directing the appellant to vaccinate his child, and disobeyed, and the appellant fined for that offence, a second order can be made, and if disobeyed, whether the appellant can be again fined: secondly, whether a certificate given by a medical practitioner in the form B., that the child is in an unfit state to be vaccinated, is an answer to the second proceedings. With regard to the first question, *Pilcher* v. *Stafford* (1) is directly in point; 16 & 17 Vict. c. 100, s. 2, and 30 & 31 Vict. c. 84, s. 31, are substantially the same, and the serious consequences stated by Cockburn, C.J., in his judgment in *Pilcher* v. *Stafford* (1) would still follow. The Chief Justice there says: "When once the offence is complete, and has been dealt with, and the person offending has been punished, no further offence can be committed. It is not enough to say the mischief continues; the answer to that is, the Act does not provide a remedy; if we were to hold otherwise on the present enactments, it would follow that for every day during which the omission to vaccinate a child continues a penalty would be incurred, so that the penalties might accumulate to a very serious amount, which could never have been the intention of the legislature. If the legislature had intended that the parent should incur penalty upon penalty for the same offence, they should have expressed their intention in plainer language." It is clear law that a man once convicted cannot be convicted a second time for the same offence. As regards the second question, the certificate is a defence to this prosecution; the language of s. 34 is express. The justices are not the judges whether the child ought to be vaccinated; the medical practitioner is the proper judge of the fact, and if he should give a false certificate he would be guilty of a misdemeanour under s. 30.

Sir J. D. Coleridge, S. G. (*Archibald* with him), for the respondent. The later Act was passed for the purpose of extending the provisions of the former Act, 16 & 17 Vict. c. 100. The later

(1) 4 B. & S. 775; 33 L. J. (M. C.) 113.

1870

ALLEN v. WORTHY.

Act contains all the provisions of the first Act, and also new provisions to remedy the continuing mischief, and to meet the very case which Cockburn, C.J. pointed out had not been touched by the former Act. *Pilcher* v. *Stafford* (1) is correctly decided, and if this had been a conviction under s. 16 of 30 & 31 Vict. c. 84, the case would have been in point. Under that section the child must be vaccinated within three months, and there could be only one offence and one penalty. Sections 16 and 29 are similar to the provisions contained in 16 & 17 Vict. c. 100; but s. 31 creates an offence of a different character. In that section the period within which the child is to be vaccinated is not limited to three months, but extends up to fourteen years, and as the object of the legislature was to enforce vaccination, fresh orders can be made and fresh penalties can be imposed, so long as the parent continues to neglect to have the child vaccinated. He is not convicted for the same offence, but for a fresh and distinct offence of not obeying the order to vaccinate. The certificate is no answer to proceedings instituted under s. 31; it may be an answer to proceedings under s. 16. Under s. 31 the justices have a right to consider whether the certificate was given bonâ fide or not. If given malâ fide, they have a right to disregard it. The words of the section are general, and unless it can be shewn to the satisfaction of the justices that there is some reasonable ground for not carrying out the order, they can convict.

Graham was heard in reply.

COCKBURN, C.J. I think, after the full discussion that we have heard on the provisions of this statute, that the decision of the justices was right, and that our judgment must, therefore, be for the respondent.

It is quite clear that, by s. 31 of 30 & 31 Vict. c. 84, it was intended by the legislature to give additional powers to the officers appointed for the purpose of ensuring vaccination and enforcing the performance of that operation. This statute, however, does not supersede the machinery provided by the previous Vaccination Act (2), but in ss. 15, 16, 18, and 29, re-enacts what has been provided by the prior statute. By s. 15 the registrar is to give notice of the

(1) 4 B. & S. 775; 33 L. J. (M.C.) 113. (2) 16 & 17 Vict. c. 100, ss. 2, 5, 9.

requirements of the Act to the parents of children, which was also necessary under the prior statute. Section 16 makes it incumbent upon parents to cause their children to be vaccinated within a certain time, and this was also required by the former Act. Section 29 makes it an offence if the parents omit to procure their children to be vaccinated according to the requirements of s. 16. Section 18 contains a provision that if the public vaccinator, or any medical practitioner, shall be of opinion that the child is not in a fit state to be successfully vaccinated, he shall forthwith give a certificate to that effect, which shall remain in force for a period of two months, and shall be renewable for successive periods of two months, until the public vaccinator or medical practitioner shall deem the child to be in a fit state for successful vaccination. If no such certificate is given, or if the time mentioned in the certificate has expired, and the child is not vaccinated, the offence is complete under s. 29. All that has nothing whatever to do with the intervention of any magisterial authority.

Now, by the construction put upon the former Act, and which is a perfectly correct construction, in the case of *Pilcher* v. *Stafford* (1), where the offence was at once complete, and the party had been convicted and punished by the infliction of a penalty, there was no provision in the Act whereby a fresh offence could be created and a fresh penalty imposed. The question here is, whether the new machinery introduced by the provision in s. 31 of 30 & 31 Vict. c. 84, will apply to such a case. It is quite clear that *Pilcher* v. *Stafford* (1) would have applied if s. 31 had not been introduced into this Act; but I think, upon consideration, that the introduction of that section distinguishes this case. Section 31 provides that if any child under the age of fourteen years has not been successfully vaccinated, notice may be given to the parents to have the child vaccinated, and in the event of the notice being disregarded, the registrar is authorized to give information to a justice, who shall summon the parent and inquire into the matter, and if he shall be satisfied that the child has not been vaccinated, he may make an order for the vaccination of the child within a certain time, and then, if the child shall not be vaccinated in compliance with that order, the statute creates

(1) 4 B. & S. 775; 33 L. J. (M. C.) 113.

1870

ALLEN v. WORTHY.

an offence, namely, an offence of having disobeyed the order of the justice.

Now in this case the appellant received notice from the registrar to have the child vaccinated, which brings the case within s. 31. The matter was brought before the justices, and they made an order for the vaccination of the child. The order was not complied with, an information was laid against the appellant, he was convicted and a penalty was imposed. Nevertheless, the order of the justices was not complied with. The matter was again brought before the justices, and a fresh order to have the child vaccinated was made. That order was disobeyed, and now the appellant has been convicted for the disobedience of that order, which is an offence under s. 31. It is said that the powers given by s. 31 cannot be exercised toties quoties. I was at first disposed to think that there was some foundation for this contention; but the Solicitor General has satisfied me that it is competent to justices to make an order toties quoties, as it shall be shewn to their satisfaction that the notice has not been complied with, and that the child remains unvaccinated. The language is general; I do not see anything to control it; and, when we look to the intention of the legislature, I think we are bound to give a reasonable construction to this, which was evidently intended as a remedial Act. The question seems to have been agitated in the public mind as to whether vaccination is or is not a beneficial measure; however that may be, the legislature has thought fit to make it compulsory. I think, therefore, that the intention of the legislature was not simply that a penalty should be imposed on a person once for all if he omitted to do that which, in the view of the legislature, public health and safety required, but that a penalty might be imposed so long as disobedience to its enactments continued. I therefore hold that the powers given by s. 31 are not confined to one order and one conviction, but that the proceedings may be repeated toties quoties so long as disobedience continues.

It is said that there was an answer to the proceedings, because a medical practitioner had given a certificate that the child was not in a fit state to be vaccinated, and the question is, whether that certificate is a bar to proceedings instituted under s. 31. I think it is not. I think the effect given by the statute to the

certificate of the medical practitioner has no application to proceedings instituted under this section. It is to be observed that the provision with regard to giving such a certificate, and to its effect, is to be found in s. 18, following immediately upon those enactments which relate to vaccination by parents, within three months of the child's birth; and therefore I think that, primâ facie, it must be considered as intended to apply to those enactments, and not to s. 31. There is an obvious distinction. The earlier sections have reference to what parents are to do upon notice being given by the registrar. If they fail to fulfil the requirements of the statute after receiving the notice, they are, under s. 29, guilty of a misdemeanour, and to that offence the certificate may be an answer, because it has reference to a proceeding emanating from the parents themselves, and in which there has been no intervention of any judicial authority to establish the fact that the child is a fit subject for vaccination. But it is a different thing when you come to s. 31, where notice having been previously given by the registrar, the matter is brought before the justices, who can hear all the parties, and who, after such inquiry, are competent to make an order that the child shall be vaccinated. Then it would be proper that the medical evidence upon the subject of the fitness of the child to be vaccinated should be received and considered, but not to the extent of taking away from the justices their discretionary power. There is nothing in the language of s. 31 which puts any restraint upon the exercise of his judgment by the justice; but if he, upon the consideration of all the circumstances, shall see fit, he is to make an order directing the child to be vaccinated, then "if, at the expiration of such time, the child shall not have been so vaccinated, or shall not be shewn to be unfit to be vaccinated, or to be insusceptible of vaccination, the person upon whom such order shall have been made shall be proceeded against summarily, and unless he can shew some reasonable ground for his omission to carry the order into effect, he shall be liable to a penalty not exceeding twenty shillings." There is total silence there as to the production of any such certificate as that which we have under s. 18; on the contrary, the parent must shew some reasonable ground for his omission, or he is liable to be convicted in the amount of the penalty. Then, of the

1870

ALLEN v. WORTHY.

reasonableness of the ground which he alleges as the ground for the omission to carry the order into effect, of course the justice, before whom the information is laid, and by whom the penalty is imposed, must be the judge. But then it is argued that, by s. 34, the production of such a certificate would be a good defence. The offence under s. 31 is that of disobeying the order of the justice. The offence to which a certificate is an answer, under s. 34, is that of neglecting to procure the vaccination of the child. That shews that what is enacted in s. 34 has reference to ss. 15, 16, and 29, and not to s. 31. Then s. 34 states: "If the defendant produce any such certificate as hereinbefore described—that is, that the child is not in a fit state to be vaccinated, or is insusceptible of vaccination, or has had the smallpox—or the register of vaccination kept by the registrar as hereinbefore provided, in which the certificate of successful vaccination of the child shall be duly entered, the same shall be a sufficient defence." All this has no reference to s. 31, but has reference to the earlier sections. It is for the justice, therefore, in determining whether an order shall be made, under s. 31, to consider the effect of any certificate, and if he is satisfied that the certificate is not one on which he ought to act, it is perfectly competent for him to refuse to be guided by it. Whether in this case the justices may not have been hasty in adopting the view which they did of the certificate, I cannot say. That is not a matter for us to decide. The only question for us is, whether the production of that medical certificate is a sufficient answer to the information. I think it is not. Under these circumstances, I am of opinion that the decision of the justices was right.

MELLOR, J. I am entirely of the same opinion. I was a party to the decision in *Pilcher* v. *Stafford* (1), and I concurred in all that was said by the Lord Chief Justice in delivering the judgment of the Court in that case, and I am satisfied that it was the only decision at which the Court could have arrived in the then existing state of the law; but alterations have since been made, the policy of which is obvious, and it is our duty to carry out the intention of the legislature.

Section 34 applies only to cases which come within ss. 15, 16

(1) 4 B. & S. 775; 33 L. J. (M. C.) 113.

1870

ALLEN v. WORTHY.

and 29, and I think that the intention of the legislature would have been more clearly understood if this section had followed immediately upon those to which it doubtless refers, and we must read it as if it had been so placed. If we look at the form of the certificates given in the schedule to the Act, we find that they apply to the provisions in ss. 15, 16 and 29. The first certificate is a certificate that the child is not in a fit and proper state for vaccination; but that is only to endure for two months, and if it is again intended to make that excuse, a fresh certificate must be obtained that the child is still not in a fit state for vaccination. The second is where the child has been three times unsuccessfully vaccinated; then the certificate is to be, that the child is insusceptible of successful vaccination. The last is, that the vaccination has been successfully performed. All these certificates are a bar to the proceedings under the earlier sections, but they have no application to a case under s. 31, and I think the policy is obvious. The former sections dealt with cases of children of the tender age of three months, s. 31 extends the power of the justices to children up to the age of fourteen years. Whether the justices had sufficient ground for holding that the child was properly brought before them is another thing, but I think they were not bound to hold otherwise. I think, as long as the child remains unsuccessfully vaccinated, so long is the parent liable to have an order made on him to vaccinate the child; and therefore the justices were right in their decision, and our judgment must be for the respondent.

HANNEN, J., concurred.

Judgment for the respondent.

Attorneys for appellant: *Thomas & Hollams, for Conquest & Stimson, Bedford.*

Attorney for respondent: *The Solicitor to the Treasury.*

1870
Jan. 27.

EX PARTE SHORT.

Wine and Beerhouse Act, 1869 (32 & 33 *Vict. c.* 27), *s.* 17—*Previous Conviction —Offence against Tenor and Conditions of Licence—Second Offence.*

By s. 17 of The Wine and Beerhouse Act, 1869, "where any person is convicted of an offence against the tenor or conditions of a licence granted to him under any of the therein recited Acts, if any previous conviction since the passing of this Act be proved against him, the offence of which he is last convicted shall be deemed to be a second or third offence as the case may be. The defendant, who held a licence to sell beer under 11 Geo. 4 & 1 Wm. 4, c. 64 (one of the recited Acts), had been, since the passing of the above Act of 1869, convicted under 11 & 12 Vict. c. 49, s. 1, of keeping her house open on Sunday forenoon, which was also contrary to the tenor of her licence, and she was afterwards convicted of refusing to admit a constable under 4 & 5 Wm. 4, c. 85, s. 7, and adjudged as for a second offence:—

Held, that the first conviction was for an offence against the tenor of her licence so as to make it a previous conviction within the meaning of s. 17.

MOTION for a rule, calling on two Justices of Cheshire to shew cause why a writ of certiorari should not issue to bring up a conviction made by them on the 6th of October, 1869, whereby one Margaret Short, being a person licensed to sell beer, ale, and porter by retail, was convicted that she did unlawfully refuse to admit one Hindley into her house, he being a police constable and in the due execution of his duty.

The conviction recited four previous convictions against Margaret Short, for keeping her house open for the sale of beer on Sundays during prohibited hours; the last of such convictions being on the 25th of July, 1869, under 11 & 12 Vict. c. 49, s. 1, which makes it an offence to open a house for the sale of beer on Sundays before half-past twelve; and adjudged that Margaret Short should be disqualified from selling beer for two years under 4 & 5 Wm. 4, c. 85, s. 7, by which statute the justices were empowered to inflict such a punishment if the offence were a second offence.

By s. 17 of the Wine and Beerhouse Act, 1869 (32 & 33 Vict. c. 27), it is enacted that "where any person is convicted of an offence against the tenor or conditions of a licence granted to him under any of the said recited Acts [11 Geo. 4 & 1 Wm. 4, c. 64; 4 & 5 Wm. 4, c. 85; 3 & 4 Vict. c. 61; 24 & 25 Vict. c. 21; 26 & 27 Vict. c. 33], or of an offence for which a penalty is imposed

1870

EX PARTE SHORT.

by the said recited Acts . . . if any previous conviction or convictions since the passing of this Act [12th of July, 1869], for any of the said offences be proved against him, the offence of which he is last convicted shall be deemed to be a second or third offence, as the case may be. . . ."

Short's licence was for the sale of beer by retail, under 11 Geo. 4, and 1 Wm. 4, c. 64, and provided, amongst other things, that she should not permit any beer to be drank or consumed in or upon or to be conveyed from or out of her premises between the hours of ten o'clock in the forenoon and one o'clock in the afternoon on Sundays.

J. Paterson, in support of the motion. This conviction is bad. The applicant has been convicted under s. 7 of 4 & 5 Wm. 4, c. 85, for refusing to admit a constable, and has been adjudged disqualified from selling beer for two years; which punishment can only be inflicted in the case of a second offence. Here there has been no previous offence. The applicant had been convicted since the passing of the Wine and Beerhouse Act, 1869, of keeping her house open for the sale of beer on Sunday during prohibited hours, and it will be contended that this is a previous conviction under s. 17. But, in order to make it a previous conviction under that section, it must have been a conviction for an offence against the tenor or conditions of her licence. The alleged previous conviction was under s. 1 of 11 & 12 Vict. c. 49, which creates a substantive offence, and imposes a new penalty.

[BLACKBURN, J. The applicant, by keeping her house open on Sunday before one o'clock in the afternoon, committed an offence against the tenor or conditions of her licence. The offence under 11 & 12 Vict. c. 49, is the same.]

The 11 & 12 Vict. c. 49, s. 2, has impliedly repealed the provision in the licence as to that offence. This was expressly held in *Reg.* v. *Whiteley*. (1) The case therefore does not fall within s. 17.

G. Tayler appeared to shew cause in the first instance, but was not heard.

COCKBURN, C.J. The offence created by 11 & 12 Vict. c. 49, s. 1, is identical with what is prohibited by the licence. I think

(1) 3 H. & N. 143; 27 L. J. (M. C.) 217.

1870

EX PARTE SHORT.

it clearly comes within the words of The Wine and Beerhouse Act, 1869, as being an offence against the tenor of the licence granted. That is exactly what the legislature had in view. They knew there was an Act of Parliament prohibiting the selling of beer within certain hours, and they framed this section accordingly.

BLACKBURN, J. I am of the same opinion. The obvious intention of the Act was, if the offence charged was after a conviction for one of the same class of offences, it should be followed by the same consequences as if it was a repetition of the same offence. Then s. 17 defines the class as being anything against the tenor of the licence. Whether the penalty is under the one Act or the other, the offence for which there has been a conviction is an offence against the tenor of the licence, and that is sufficient.

MELLOR, J., concurred.

Rule refused.

Attorney for prosecution: *R. M. F. Rowe.*

Attorneys for defendant: *Makinson & Carpenter, for E. & C. Bretherton, Birkenhead.*

Jan. 31.

THE QUEEN *v.* PRATT.

The Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *s.* 4, *subs.* 2: "*Default in Payment of any Sum Recoverable summarily before a Justice*"—*Costs awarded by Quarter Sessions on Appeal, enforced by Warrant of Commitment by a Justice, under* 11 & 12 *Vict. c.* 43, *s.* 27, *and* 12 & 13 *Vict. c.* 45, *s.* 5.

By The Debtors Act, 1869, s. 4, with the exceptions thereinafter mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment: . . . 2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:—

Held, that costs, which had been awarded by quarter sessions against one of the parties to an appeal, and which by 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27, may be enforced before a justice by warrant of distress, and in default of distress by warrant of commitment, are within the above exception; and the defaulter is therefore not protected from imprisonment.

RULE, calling on G. H. Pratt to shew cause why a writ of habeas corpus should not issue to bring up the body of Isabella Cole, &c.

Cole had obtained an order of affiliation against Pratt, under 7 & 8 Vict. c. 101, and on appeal by Pratt, under s. 4, the quarter

1870

THE QUEEN v. PRATT.

sessions quashed the order, and ordered costs to be paid by the respondent Cole to the appellant Pratt.

The costs were not paid, and ultimately, on the 22nd of January, 1870, in default of distress, Cole was duly committed to prison by a warrant of a justice for two months, unless the costs, &c., were sooner paid, under 11 & 12 Vict. c. 43, and 12 & 13 Vict. c. 45. (1)

This rule was then obtained, on the ground that Cole was no longer liable to be imprisoned by virtue of The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4. (2)

D. Seymour, Q.C., and *Hopwood*, shewed cause. The applicant

(1) By Bains' Act (12 & 13 Vict. c. 45), s. 5:—"Upon any appeal to any court of general or quarter sessions of the peace, the court before whom the same shall be brought may, if it think fit, order and direct the party or parties against whom the same shall be decided, to pay to the other party or parties such costs and charges as may to such court appear just and reasonable, such costs to be *recoverable* in the manner provided for the *recovery* of costs upon an appeal against an order or conviction by 11 & 12 Vict. c. 43."

By Jervis' Act (11 & 12 Vict. c. 43), s. 27:—"After an appeal against any such conviction or order as aforesaid shall be decided, if the same shall be decided in favour of the respondents, the justice or justices who made such conviction or order, or any other justice of the peace of the same county, riding, division, liberty, city, borough, or place, may issue such warrant of distress or commitment as aforesaid, for execution of the same, as if no such appeal had been brought [see ss. 18—21]; and if, upon any such appeal, the court of quarter sessions shall order either party to pay costs, such order shall direct such costs to be paid to the clerk of the peace of such court, to be by him paid over to the party entitled to the same, and shall state within what time such costs shall be paid; and if the same shall not be paid within the time so limited, and the party ordered to pay the same shall not be bound by any recognizance conditioned to pay such costs, such clerk of the peace or his deputy, upon application of the party entitled to such costs, or of any person on his behalf, and on payment of a fee of 1*s.*, shall grant to the party so applying a certificate (R.) that such costs have not been paid; and upon production of such certificate to any justice or justices of the peace for the same county, riding, division, liberty, city, borough or place, it shall be lawful for him or them to enforce the payment of such costs by warrant of distress (S. 1), in manner aforesaid; and in default of distress he or they may commit (S. 2) the party against whom such warrant shall have issued in manner hereinbefore mentioned, for any time not exceeding three calendar months, unless the amount of such costs, and all costs and charges of the distress, and also the costs of the commitment and conveying of the said party to prison, if such justice or justices shall think fit so to order (the amount thereof being ascertained and stated in such commitment), shall be sooner paid."

(2) The Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4:—"With the excep-

1870

THE QUEEN v. PRATT.

was lawfully imprisoned; the case is not within The Debtors Act, 1869 (32 & 33 Vict. c. 62). The enactment of s. 4 only applies to cases of debt and imprisonment under civil process. And this is shewn by s. 5, which still allows committal for small debts under certain conditions. But assuming costs in general to be within the enactment, this case is within the first or second exception. These costs were awarded by quarter sessions under 7 & 8 Vict. c. 101, s. 4. Previous to Bains' Act (12 & 13 Vict. c. 45), the only mode of enforcing the payment of costs under an order of sessions was by indictment: *Reg* v. *Mortlock* (1); by s. 5 of that Act, costs awarded by quarter sessions in all cases of appeal, are recoverable as under Jervis' Act (11 & 12 Vict. c. 43); and by s. 27 the mode of proceeding is by production of the certificate of the clerk of the peace before a justice, who grants a warrant of distress, and in default of distress may commit to prison for not more than three months; and the further details are given in ss. 18—21. This is in the nature of a criminal proceeding for a penalty, and not civil process: *Bancroft* v. *Mitchell* (2); *Ex parte Graves.* (3) Secondly, if not a penalty, these costs are "a sum recoverable summarily before a justice of the peace."

[COCKBURN, C.J. It may be said that they were not recovered summarily before a justice, but before the quarter sessions, and enforced only by a justice acting ministerially.]

"Recoverable" is the term used in 12 & 13 Vict. c. 45, s. 5, to describe this very process. Costs awarded by quarter sessions shall be "recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction, under 11 & 12 Vict. c. 43." Again, in s. 18 of the latter Act, "recoverable" is used to denote the process by which the payment is enforced. The legislature, therefore, must be taken in The Debtors Act, 1869, to use the words "recoverable summarily" in the same sense.

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tions hereinafter mentioned, no person shall, after the commencement of this Act, be arrested or imprisoned for making default of payment of a sum of money. There shall be exemption from the operation of the above enactment: 1. Default in payment of a penalty, or sum in the nature of a penalty, other than a penalty in respect of any contract: 2. Default in payment of any sum recoverable summarily before a justice or justices of the peace. . . ."

(1) 7 Q. B. 459.

(2) Law Rep. 2 Q. B. 549.

(3) Law Rep. 3 Ch. Ap. 642.

1870

THE QUEEN v. PRATT.

J. W. Mellor, and *Lumley*, in support of the rule. This is clearly not a criminal proceeding, or proceeding in pænam, but in the nature of civil process: see the judgment of the Court in *Reg.* v. *Berry*. (1)

[COCKBURN, C.J. We have no doubt the case does not come within the first exception in s. 4, of a penalty; the question is, whether it does not come within the second exception as a sum summarily recoverable before a justice.]

The first part of the section is clearly wide enough to include such costs as these; and they cannot be said to be summarily recoverable before a justice, inasmuch as they were adjudged by, and therefore recovered before, the court of quarter sessions. "Summarily recoverable" is a term of art, and only properly applicable to the court or tribunal before whom the sum is recovered, that is, awarded or adjudged, and does not apply to the subsequent process by which the payment is enforced. And a sum can be said to be summarily recoverable before a justice only on summons and order. Thus, in 11 & 12 Vict. c. 43, s. 22, justices are authorized to issue warrants to levy by distress penalties or other sums *recovered* before them; and the statutes are innumerable,—take, for instance, 11 & 12 Vict. c. 63, s. 49,—in which costs and expenses are said "to be recoverable in summary manner," that is, by information and complaint, and these are called expressly "summary proceedings" in s. 29 of 11 & 12 Vict. c. 43. So, in a later Act, 29 & 30 Vict. c. 2, s. 30, "The Cattle Diseases Prevention Act, 1866," penalties under the Act, and expenses, "may be recovered before two justices in manner directed by 11 & 12 Vict. c. 43;" that is, by the "summary proceedings" mentioned in s. 29. A sum cannot be said to be recovered summarily before a justice, when he does not act judicially and award it, but only acts ministerially in enforcing it when it has been already recovered before another tribunal. A party "recovers" judgment, or verdict, and he "enforces" it by levy. These costs, therefore, were a sum enforceable before a justice, but not "recoverable summarily."

COCKBURN, C.J. I am of opinion that this case does fall within the second exception of s. 4. Costs are clearly within the terms

(1) 28 L. J. (M. C.) at p. 89.

1870

THE QUEEN v. PRATT.

of the enactment of the section, viz., "a sum of money;" for otherwise, costs of a defendant on a judgment in his favour in one of the superior courts would not be within the enactment. Therefore, I so far agree with the argument of counsel in support of the rule, that the case is primâ facie within the protection of the Act. But, then, is not this a default in the payment of "a sum recoverable summarily before a justice of the peace"? I think it is; and I should be surprised, if in an Act of Parliament, the object of which is to abolish imprisonment for debt in the ordinary sense of that term, and in which is contained a series of exceptions, a case of this kind should be omitted. Now, what is the language of former statutes, when referring to this very process by which the payment of costs, ordered by quarter sessions, or by a justice, is to be enforced? Both in Bains' Act (12 & 13 Vict. c. 45, s. 5), and in Jervis' Act (11 & 12 Vict. c. 43, s. 18), the process is spoken of and referred to in the very terms of this second exception, viz., that the costs shall be "recoverable." It is urged on behalf of the applicant, that "recoverable summarily" must refer to the cases where the procedure is by summons before justices and costs or sums of money are awarded and ordered to be paid; and, no doubt, that is a more accurate use of the word "recover" than when it is applied to the mode of enforcing costs already awarded; but, I think, that this second exception was intended to take out of the operation of the enactment all cases in which costs or sums of money are recovered by process before magistrates, whether in the first instance by a judicial sentence, or afterwards, by a merely ministerial act, and was not intended to be confined to the first class only. Looking at the general scope and object of The Debtors Act, 1869, and the use of the very same term "recoverable," as applied to this very process, in the former statutes, I have no doubt that the case comes within the exception, and that the applicant was rightly imprisoned. The rule must, therefore, be discharged.

BLACKBURN, J. I am of the same opinion. The imprisonment was perfectly regular, unless The Debtors Act, 1869, renders it unlawful. That statute begins by enacting, in as general words as can well be used, that, "except as hereinafter mentioned, no person

shall be arrested or imprisoned for making default in payment of a sum of money;" and the question is, whether the present case comes within the second exception, of a "sum recoverable summarily before a justice of the peace." There are many cases in which sums of money are recoverable summarily before a justice, and it was argued that "summarily recoverable" is a term of art, confined to cases in which, after summons and hearing, the justice awards a sum to be paid. But I do not agree that the term "recoverable summarily" is to be so confined; no doubt a sum is recovered, more strictly speaking, where the justice has to adjudicate; but there is a secondary sense in which, though the sum has been awarded or determined beforehand, as in the case of a poor-rate, or in this very case of costs awarded by quarter sessions, the word "recoverable" is applied to the mode of enforcing the sum previously determined. The legislature must be taken to be aware that justices might imprison both in the case where they award the sum, and in cases where the sum has been previously awarded by another tribunal; and that in a great number of instances payment of a sum of money, though recoverable in a summary manner before a justice, yet was enforced by process of imprisonment by warrant of another justice. Bearing that in remembrance, it was the most natural thing that, while abolishing imprisonment for debt in general cases, the legislature should say we do not by the present enactment intend to abolish all imprisonment, and consequently should insert an exception which should take out of the operation of the enactment all cases of imprisonment by a summary process before justices for the nonpayment of a sum of money. The exact expression is "default in payment of any sum recoverable summarily before a justice of the peace." In Bains' Act (12 & 13 Vict. c. 45), s. 5, it is expressly said, that costs ordered by quarter sessions shall be "recoverable" in the manner provided for the recovery of costs on an appeal under Jervis' Act; and we find that the mode of recovery under Jervis' Act is this, that although the sum is fixed by the quarter sessions, yet the mode of enforcing is by warrant of distress and commitment by a single justice. Again, in Jervis' Act (11 & 12 Vict. c. 43), s. 18, the costs awarded on a summary conviction are to be "recoverable" in the same way as a penalty

1870

THE QUEEN v. PRATT.

or sum of money adjudged to be paid is "recoverable;" and where there is no penalty or sum, then such costs shall be "recoverable" by distress and sale of the goods, and in default of distress by imprisonment. Therefore we may very fairly say, when the legislature use the words "recoverable summarily before justices," it was intended to include in the term the process of enforcing the payment before a justice acting ministerially, although ancillary to the previous award by a justice or quarter sessions acting judicially.

LUSH, J. I am of the same opinion, that this case is taken out of the enacting part of s. 4 by the second exception. The words in the enacting part,—"default in payment of a sum of money,"—are advisedly used instead of "debt," in order to include cases which might not properly have been called cases of debt, such as costs on a judgment of nonsuit, or costs on a verdict for the defendant, or damages in an action of tort, or costs under a rule of court. The enacting part, therefore, uses the words "sum of money," and this clearly applies to and includes costs; and the same expression in the second exception must also equally apply to costs. Reading, therefore, "costs" in the second exception, we have, that there shall be excepted from the enactment "default in payment of any costs recoverable summarily before a justice of the peace." Were these costs recoverable summarily before a justice? They were awarded, it is true, by the court of quarter sessions; but Bains' Act (12 & 13 Vict. c. 45), s. 5, says that costs so awarded are "to be recoverable in the manner provided for the recovery of costs upon an appeal against an order or conviction by Jervis' Act," using the very expressions "recoverable" and "recovery" for the purpose of describing the process for enforcing payment of costs already awarded. Jervis' Act, s. 18, says that costs awarded on a summary conviction are to be "recoverable" in the same way as a penalty; and, by ss. 19 and 21, this is by warrant of distress, which may be issued by a justice other than the convicting justice, and in default of distress by imprisonment; and then s. 27 applies this same process to costs awarded by the quarter sessions to either party on appeal. Therefore, the statutes, on which the process in the present case is founded, use the word "recoverable" over and

over again to describe that process; and consequently, primâ facie, that term in the second exception in s. 4 applies to these costs. Is there any reason why we should give it the more limited interpretation contended for by counsel in support of the rule, and confine it to a sum awarded on a summary application before justices? If that were the true interpretation, this anomaly would follow, that on a summary conviction awarding costs, or where an information is discharged with costs, a warrant of imprisonment might issue, and the defaulter be arrested; but when, on appeal, the quarter sessions award costs, imprisonment for the nonpayment would be abolished. I cannot see any reason for making the distinction; and, therefore, as primâ facie the terms used are wide enough to include costs in both cases, I think we ought to give them the wider signification. It is also to be observed that this class of cases is not within the mischief to be remedied by the statute, which was intended to abolish imprisonment for debt for an indefinite time, and was not intended to apply to cases in which there is a distress of the person for a limited time, or till the sum be paid.

Rule discharged.

Attorneys for applicant: *Brooksbank & Galland, for Sharpley, Louth.*

Attorneys for defendant: *Woodroofe & Plaskitt, for Tweed, Lincoln.*

1870
Feb. 21.

FRANCIS *v.* COCKRELL.

Negligence—Contract of Person receiving Money for a Place in a Building to view a Public Exhibition—Contract by Carrier of Passengers—Implied Warranty of due Care of Person employed to construct Building or Carriage.

Where a man causes a building to be erected for viewing a public exhibition, and admits persons on payment of money, the contract between him and the persons admitted is analogous to the contract between a carrier and his passengers; and there is implied in such contract a warranty, not only of due care on the part of himself and his servants, but also of due care on the part of any independent contractor who may have been employed by him to construct the means of conveyance or support.

Where, therefore, the defendant, acting on behalf of himself and others interested in certain races, entered into a contract with E., who was a competent person to be so employed, to erect and let to them a grand stand for the purpose of viewing the races; and the defendant, on behalf of himself and his colleagues, received 5*s.* (to be appropriated to the race fund) from every person admitted, of whom the plaintiff was one; and the stand had been negligently and improperly constructed (but not to the knowledge of the defendant), and in consequence fell and injured the plaintiff:—

Held, that the plaintiff could maintain an action against the defendant for the damage sustained, although the defendant was free from all negligence, and had employed a competent person to erect the stand.

CASE stated under an order of Nisi Prius by agreement without regard to the pleadings.

This action is brought to recover damages for injuries sustained by the plaintiff from the falling of a grand stand, which had been erected to enable persons to view the steeplechases at Cheltenham, whilst he was upon it for that purpose on the 13th of April, 1866.

Steeplechases have been holden at Cheltenham for many years, and those for the year 1866 were holden on the 13th and 14th of April. The steeplechases for the year 1866 were got up and managed as those of former years had been. There was no formal appointment of a committee. Meetings were held for the purposes of the steeplechases, and any subscriber to the race fund, or any person interested in the steeplechases, was eligible to attend them, but the same gentlemen usually attended them each year. About twelve gentlemen usually attended the meetings for the steeplechases of 1866, namely,

Sir Alexander Ramsay and eleven others, of whom the defendant was one.

The first meeting for the year 1866 was holden, as usual, about a month or six weeks before the time of the steeplechases. It took, as usual, about a month or six weeks to "get up" the steeplechases.

The defendant was a subscriber to the steeplechases of 1866, and attended all the meetings of the committee for that year except one.

At one of the meetings the day was fixed when the races should be holden for 1866, and the prizes which should be and were given to the winners were determined upon. Sir Alexander Ramsay and other gentlemen (not including the defendant) were invited to act as stewards, and they did so act.

A fund was formed for the holding of these steeplechases, called the "Race Fund," which consisted of the subscriptions of any persons who thought proper to subscribe, the receipts from the various stands and booths permitted to be erected on the course, and for the carriages permitted to enter and stand thereon, the money received from the sale of the cards of the races, and the surplus remaining from the previous year. The race fund was deposited in a bank in the names of the defendant and Sir Alexander Ramsay.

The fund was applied by the gentlemen attending the meetings to the expenses incidental to the getting up, managing, and holding the steeplechases, the cost of the erection of stands, the payment of the ground rent for the course, and the prizes given to the winners. The gentlemen who attended the meetings and acted as aforesaid did so gratuitously, as also did the defendant.

A meeting was holden in March, 1866. The defendant was present, and took part in the discussion, when it was decided to have a stand. The chairman was desired to request the defendant to order it as usual, with certain modifications, and the defendant agreed to order it. It was also determined, in like manner, that the public should be admitted to the grand stand and paddock in front upon paying, as theretofore, 5*s.* each person, and the defendant was requested to let the refreshment-room under the grand stand, and manage and superintend the taking

1870

FRANCIS v. COCKRELL.

of this admission-money, and he agreed to do so, and did so. The defendant had been, for several of the previous years, in like manner requested to perform the like duties, and had performed them.

The grand stand, for many of the previous years, had been erected by Messrs. Eassie, of Gloucester, architects and builders, and none of those stands had ever been found insufficient or improper. Messrs. Eassie were very experienced and competent and proper persons to be employed in and about the erecting of a sufficient and safe grand stand for the purpose required.

The defendant, after being so requested, went to Messrs. Eassie, and told them that it was determined to have a grand stand, as usual, with certain modifications, and asked them to submit their offer in writing.

Messrs. Eassie accordingly wrote to "the Secretary of Steeplechase Committee," offering "to re-erect a stand for next month's meeting, of same size as usually hired by you of us at previous meetings, but with weighing and other rooms modified as arranged with Mr. Cockrell last year, for 66*l.* 10*s.*"

This offer was accepted at one of the meetings, at which the defendant was present and acted; and Messrs. Eassie erected a grand stand upon the course rented by the gentlemen attending the meetings at a part determined upon at one of the meetings, and a ring fence of hurdles was provided by direction of the gentlemen attending one of the meetings. The grand stand so erected was built of timber, with a refreshment bar at the bottom on the ground, and a part above, raised over the refreshment bar, for persons to stand or sit to see the steeplechases, and which was reached by steps from the ground.

The ring fence included a piece of ground between the front of the grand stand and the course, where persons could also stand and see the steeplechases; and it also included the betting ring and saddling paddock. It was erected about the same spot as the stand of 1865, and in a similar manner to that stand, at which no accident occurred.

No person was employed by the gentlemen attending the meetings, or the defendant, to survey the stand after it was so erected, nor did they or any of them, nor did the defendant, personally

inspect the stand until after it had been repaired subsequently to the accident. There was not any formal handing over of the stand by Messrs. Eassie to the gentlemen aforesaid, or any one on their behalf; but Messrs. Eassie were not entitled to, and did not, in fact, exercise any control over the admission of spectators to the enclosure or to the stand. Messrs. Eassie employed their foreman to superintend the erecting of the stand; and when its erection was ended, on the 12th of April, reported to the defendant that it was finished, and Messrs. Eassie, as was usual, directed their foreman to be there on the race day, in case any alteration or small thing should be required to be made.

The gentlemen attending the meetings, and the defendant and the stewards did not, nor did any or either of them personally interfere in the erection of the stand.

The public were admitted within the ring fence upon payment of 5*s.* for each person at a gate placed for the purpose, and at which a ticket was given to entitle the owner to readmission if he afterwards went outside. The defendant appointed a person to prevent anybody entering within the ring fence without paying the 5*s.*, and to take the money from those who did enter; and during part of the time of the steeplechases the defendant himself stood at the gate, took the money, and admitted persons.

Any person entering the ring fence, and paying 5*s.*, had the right to go upon the grand stand, in the place made for the purpose to see the steeplechases.

The plaintiff was a stranger at Cheltenham, and on the 13th of April, 1866, being the first day of the steeplechases, he paid 5*s.* at the gate, to the person placed there for the purpose, took his ticket and entered the ring fence, and thereupon became entitled to go up, and did lawfully go upon the grand stand in the place appointed for the purpose, to see one of the steeplechases; and whilst he was so lawfully there, and without any fault or omission on his part, the portion of the grand stand near which he was gave way, and fell, and the plaintiff was thrown to the ground, and was thereby injured.

The grand stand and the part which so gave way, and fell, were, in fact, negligently and improperly erected, and were insufficient for the purpose for which they were erected and used, and

1870

FRANCIS v. COCKRELL.

gave way, and fell, from being so negligently and improperly erected.

Before the accident, the gentlemen attending the meetings, the plaintiff, the defendant, and the stewards, had not, nor had any of them, any notice or knowledge that the grand stand and part, or either of them, had been or were so negligently and improperly erected, or so insufficient as aforesaid.

The question for the opinion of the Court was, whether or not the plaintiff is entitled to recover in an action of tort or on contract compensation from the defendant for the injuries sustained by the plaintiff.

April 30, 1869. *Mellish, Q.C.* (with him *Harington*), for the plaintiff. The question is, what is the extent and degree of liability of a person who erects a building and invites the public to take places in it on the payment of money. It is quite clear that there was a contract between the defendant and the persons admitted, as he received 5*s.* from each by himself or his servants; and it makes no difference that the money does not go into his own pocket but towards the race fund. It must be taken, no doubt, that the defendant employed competent persons to erect the stand, but it is expressly found that the stand was erected in a negligent and insufficient manner, and it is also found that the defendant took no care to have it examined before it was used.

[LUSH, J. It is not found that the insufficiency could have been discovered by mere inspection.]

The defendant ought to have employed a competent surveyor.

[HANNEN, J. He did employ a competent builder. If this is no answer, and he ought to have employed a competent surveyor, neither is, that any answer, supposing the surveyor guilty of negligence. Where is the liability to stop?]

The contract to be implied between the defendant and the plaintiff is, that reasonable care had been used to make the stand fit and sufficient for its purpose. This is the contract which is implied in the very analogous case between a carrier and passenger, although there is not an absolute warranty of security: *Readhead* v. *Midland Ry. Co.* (1) Thus in *Grote* v. *Chester and*

(1) Law Rep. 2 Q. B. 412.

Holyhead Ry. Co. (1), which was an action for damages caused to a passenger of the defendants by the fall of a bridge, Parke, B., said that the defendants would still be liable for the accident notwithstanding they had employed a competent engineer, "unless he also used due and reasonable care, and employed proper materials for the work;" and again, "a coach proprietor is liable for an accident which arises from an imperfection of the vehicle, although he has employed a clever and competent coachmaker." And Pollock, C.B., says, "It cannot be contended that the defendants are not responsible for the accident, merely on the ground that they have employed a competent person to construct the bridge."

[LUSH, J., referred to the *Polytechnic Cases.* (2)]

In *Brazier* v. *Polytechnic Institution* (3) the jury having negatived personal negligence in the defendants, Wightman, J., insisted on their saying whether persons employed by the defendants had been guilty of negligence; and the jury having found in the affirmative, the verdict was entered for the plaintiff. In *Readhead* v. *Midland Ry. Co.* (4) the majority of the Court, while negativing an absolute warranty of roadworthiness in the carriage, clearly considered that the contract extended to a warranty against the negligence of the manufacturer; and all the cases as to carriers go that length. Of this *Burns* v. *Cork and Bandon Ry. Co.* (5) cited by Mellor, J., in *Readhead* v. *Midland Ry. Co.* (6) is a good instance. If a duty be imposed, either by law or by contract, the liability for a breach of this duty cannot be got rid of by shewing you have employed somebody else, even though that person be competent for the employment: *Hole* v. *Sittingbourne Ry. Co.* (7)

H. Matthews (with him *Huddleston, Q.C.*), for the defendant. There is no liability imposed on the defendant by law or by any express contract, the liability can only arise from some inference of law from the relation of the parties. The question is,

(1) 2 Ex. at p. 254, 255.
(2) *Brazier* v. *Polytechnic Institution; Pike* v. *Same*, 1 F. & F. 507, 712.
(3) 1 F. & F. at p. 509.
(4) Law Rep. 2 Q. B. 412.
(5) 13 Ir. C. L. Rep. 543.
(6) Law Rep. 2 Q. B. at p. 425.
(7) 6 H. & N. 488; 30 L. J. (Ex.) 81.

1870

FRANCIS v. COCKRELL.

is the defendant shewn to have been guilty of want of reasonable care, as an inference of law; for the Court has no power to draw inferences of fact, and if they had, the mere fact that the defendant did not have the building surveyed after it was erected is not of itself any evidence of negligence; and it is expressly found that the contractors employed by the defendant were competent persons, and that the insufficiency was not known to the defendant. The relative position of the plaintiff and defendant is very similar to that of the parties in *Indermaur* v. *Dames.* (1) There the plaintiff was on the defendant's premises by the invitation of the defendant, and fell through an unfenced shaft in the floor, and the Court of Exchequer Chamber adopts what was said by the Court of Common Pleas, that, "with respect to such a visitor, at least, we consider it settled law that he, using reasonable care, is entitled to expect that the occupier shall, on his part, use reasonable care to prevent damage from unusual danger, which he knows or ought to know." So in the analogous case of *Lancaster Canal Company* v. *Parnaby* (2), the defendants had notice of the obstruction, and had not removed it, and they were held liable on that ground. Here the defendant had no notice. The plaintiff had only a revocable licence: *Wood* v. *Leadbitter* (3); and in *Gautret* v. *Egerton* (4) it was held, that a person going on the land of another, by his permission, could not maintain an action against the owner for not protecting him against danger which he encountered whilst availing himself of the licence.

[HAYES, J., referred to *Collis* v. *Selden.* (5)]

Southcote v. *Stanley* (6) is to the same effect. *Allen* v. *Hayward* (7) is an instance in which it was held that the employer was not liable for the negligence of a contractor. The case of a carrier is not analogous to the present: the contract of carriers has always been held to be one involving large liability. Moreover, the cases cited are all distinguishable. In *Readhead* v. *Midland Ry. Co.* (8), all that was decided was that all negligence being negatived the carrier was not liable; but the Court do not say

(1) Law Rep. 1 C. P. 274, 288; 2 C. P. 311, 313. 12 Jur. N. S. 432
(2) 11 A. & E. 223, 243.
(3) 13 M. & W. 838.
(4) Law Rep. 2 C. P. 371.
(5) Law Rep. 3 C. P. 495.
(6) 1 H. & N. 247; 25 L. J. (Ex.) 339.
(7) 7 Q. B. 960.
(8) Law Rep. 2 Q. B. 412.

that the carrier would have been liable, had negligence on the part of the manufacturer been shewn. In *Grote* v. *Chester and Holyhead Ry. Co.* (1), the engineer was in fact the servant of the company, and of course they were liable for his negligence. *Brazier* v. *Polytechnic Institution* (2) does appear at first sight to be against the defendant; but in the later case against the same defendants, *Pike* v. *Polytechnic Institution* (3), Erle, C.J., ruled that the defendants were not liable for a defect in the building which was there when they took it, and of which they were not aware. So here, the defendant took the stand of the contractors and was not aware of its defective construction.

Mellish, Q.C., in reply. If the duty to be implied from the contract of the defendant with the plaintiff is, that reasonable care has been used in the construction of the building, if due care has not been used the defendant cannot get rid of that liability by shewing that he employed a competent contractor. There are numerous cases to that effect.

[LUSH, J. In those cases there was a duty imposed by law.]

It is immaterial, if there be a duty implied, whether it is expressly imposed by law or by inference of law from the contract. In *Pickard* v. *Smith* (4) the Court say, that the principal is not absolved from liability in cases where the contractor is entrusted with the performance of a duty incumbent upon his employer and neglects its fulfilment, whereby an injury is occasioned.

Cur. adv. vult.

Feb. 21. The judgment of the Court (Cockburn, C.J., Lush and Hannen, JJ.) (5), was delivered by

HANNEN J. The facts material to the determination of this case are these. The defendant, acting on behalf of himself and several other persons interested in the Cheltenham steeplechases, entered into a contract with Messrs. Eassie by which they engaged to erect and let to the defendant and the other persons a temporary stand for the accommodation of persons desiring to see the

Post 504

(1) 2 Ex. 251.
(2) 1 F. & F. 507.
(3) 1 F. & F. at p. 715.
(4) 10 C. B. (N. S.) at p. 480.
(5) Hayes, J., was present during the argument, but died before the judgment was prepared.

1870

FRANCIS v. COCKRELL.

races. The stand having been erected, the defendant, on behalf of himself and his colleagues, received money from visitors for the use of places on the stand. Messrs. Eassie were competent and proper persons to be employed to erect the stand, but it was in fact negligently erected by them; and in consequence of its being so negligently erected it fell, and the plaintiff, who had paid for admission, and was upon the stand looking at the races, was injured by the fall. Neither the plaintiff nor the defendant knew of the improper construction of the stand.

We think it clear that the defendant, by receiving money from the plaintiff as the price of his admission to the stand, entered into some engagement with him with reference to its condition; but, in order to determine whether the defendant is liable in damages for the injury which the plaintiff has sustained, we have to consider what the extent of that engagement was.

The nearest analogy to this case seems to be afforded by that of carriers of passengers. The carrier is paid for providing the means of transporting the passenger from place to place. The defendant received payment for providing the means of supporting the spectator at a particular place. This distinction does not appear to give rise to any difference in principle between the contract to be implied in the one case and the other, as to the safety of the means provided for carriage or support.

The recent decision of the Exchequer Chamber, affirming the judgment of this Court, in *Readhead* v. *Midland Ry. Co.* (1), has established that there is not in such a case any implied warranty that the carriage provided is in all respects fit for its purpose; but that decision, while it gives confirmation (if any were needed) to the proposition that the carrier undertakes that *he* has used due care in providing safe means for the conveyance of the passenger, expressly leaves undetermined the further question whether the carrier also undertakes that due care has been used by those who have contracted with him to provide the means of conveyance: see Law Rep. 4 Q.B. at p. 393.

In the present case it is not found that the defendant was himself wanting in due care, and no power to draw inferences of fact is given to the Court; and if it were, we should not be able to draw

(1) Law Rep. 4 Q. B. 379.

the inference that the defendant was personally guilty of any want of care. He employed competent and proper persons who had efficiently executed similar work on previous occasions. The circumstance that the defendant did not himself survey or employ any one to survey the stand after it was erected, does not in itself establish the charge of negligence; for it does not appear that the defect was such as could have been discovered on inspection; and even if it had been, it cannot be laid down as necessarily a want of care not to inspect, although it would in some circumstances be evidence from which a jury might properly find that due care had not been taken.

It becomes necessary, therefore, for us to consider whether the contract by the defendant to be implied from the relation which existed between him and the plaintiff was that due care had been used, not only by the defendant and his servants, but by the persons whom he employed as independent contractors to erect the stand.

It is said in the judgment of the Court of Exchequer Chamber in *Readhead* v. *Midland Ry. Co.* (1), "Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty as well as of the party to whom it is supposed to be given." Applying this rule to the present case, we think that the contract by the defendant with the plaintiff did contain an implied warranty that due care had been used in the construction of the stand by those whom the defendant had employed to do the work, as well as by himself.

In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured the means of carriage or contracted with some one else for its manufacture. If the carrier has contracted with some one else the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge and over which he can have no control; while the carrier can introduce what stipulations

(1) Law Rep. 4 Q. B. at p. 392.

1870

FRANCIS v. COCKRELL.

and take what securities he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care, the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier: *Longmeid* v. *Holliday*. (1) Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected and whose breach of contract has caused the mischief.

We have already stated that we consider the same reasoning which is applicable to the case of a carrier of passengers is applicable to the case of a person who, like the plaintiff, provides places for spectators at races or other exhibitions.

But not only do we think that when the reasons of justice and convenience on the one side and on the other are weighed, the balance inclines in favour of the plaintiff, but we are also of opinion that the weight of authority is on the plaintiff's side.

All the cases bearing on this subject are collected and commented on in the judgment in *Readhead* v. *Midland Ry. Co.* (2) It will only be necessary to refer to a few of them. In the earlier decisions the language of the judges is perhaps ambiguous. Thus, in *Christie* v. *Griggs* (3), Sir James Mansfield, C.J., says: "The carrier did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go, he would provide for their safe conveyance. Therefore, if the breaking down of the coach was purely accidental, the plaintiff has no remedy for the misfortune he has encountered." Taken strictly, this would support the plaintiff's contention; because, if the manufacturer whom the carrier employed was guilty of negligence, the undertaking was not fulfilled, that the carriage should be safe "as far as human care and fore-

(1) 6 Ex. 761; 20 L. J. (Ex.) 430: see *George* v. *Skivington*, Law Rep. 5 Ex. 1.

(2) Law Rep. 4 Q. B. 379.

(3) 2 Camp. at p. 81.

sight could go;" but it is just possible that Sir James Mansfield meant "as far as human care on the defendant's part could go."

The same remark is applicable to what is said by Best, C.J., in *Crofts* v. *Waterhouse* (1); but it is clear that Alderson, B., in *Sharp* v. *Grey* (2), considered that the carrier of passengers was liable, not only for those defects of construction which he might himself guard against, but also for those which arise from want of care on the part of the maker.

But in *Grote* v. *Chester and Holyhead Ry. Co.* (3) the point now under consideration was directly raised. There an accident happened from the defective construction of a bridge over a railway, for the erection of which the company had employed a competent engineer. It was left to the jury in effect to say whether the engineer as well as the company had used due care and skill. For the defendants it was objected that they would not be liable unless they had been guilty of negligence, and after verdict for the plaintiff it was argued for the defendants that, as they had engaged the services of a most competent engineer in the construction of the bridge, they had done their duty. Upon which Parke, B., said (4), "It seems to me they would still be liable for the accident, unless he also used due and reasonable care and employed proper materials in the work;" and later, with reference to the case of *Sharp* v. *Grey* (5), he says, "A coach proprietor is liable for an accident which arises from an imperfection in the vehicle, although he has employed a clever and competent coachmaker;" and the Court held that the jury had been properly directed, saying, "It cannot be contended that the defendants are not responsible for the accident, merely on the ground that they have employed a competent person to construct the bridge."

In *Burns* v. *Cork and Bandon Ry. Co.* (6) the same point appears to have been raised upon the pleadings. The action was for not carrying the plaintiff safely. The defendants pleaded that the cause of the accident (a defect in a crank pin) was not capable of being detected by them, and that the crank was purchased

(1) 3 Bing. at p. 321.
(2) 9 Bing. at p. 459.
(3) 2 Ex. 251.
(4) 2 Ex. at p. 254.
(5) 9 Bing. 457.
(6) 13 Ir. C. L. Rep. 543.

1870

FRANCIS v. COCKRELL.

from competent manufacturers, and that the defendants, before the journey, duly examined the crank and had no notice of the defect. To this plea the plaintiff demurred. The Court gave judgment for the plaintiff, holding the plea bad because, amongst other reasons, it did not contain any averment negativing carelessness on the part of the manufacturers. Pigot, C.B., says (1), "If the defendants had been themselves the manufacturers of the engine, they would have been bound to aver and prove that due care and skill had been exercised in the process of manufacture. Are they to be relieved from legal liability because they allege that they had purchased it from a competent manufacturer?" See also the direction of Wightman, J., in the case of *Brazier* v. *Polytechnic Institution.* (2)

We think, therefore, that both on principle and authority the plaintiff is entitled to our judgment.

Judgment for the plaintiff.

Attorneys for plaintiff: *Tamplin & Taylor.*
Attorney for defendant: *Bromley.*

Feb. 21.

THE QUEEN *v.* THE DEAN AND CHAPTER OF HEREFORD.

Cathedral "Chapter at Hereford"—3 & 4 Vict. c. 113, *s.* 25—*Patronage of Residentiary Canonries.*

By 3 & 4 Vict. c. 113, s. 25, in the cathedral church of York, as soon as a vacancy shall occur in the deanery, and in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, and Wells respectively, so soon as every person who was a member of the respective *chapters* of such churches at the passing of this Act shall cease to be such member, all the canonries shall be in the direct patronage of the Archbishop of York and of the bishops of the respective sees, who shall upon the vacancy of any canonry collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of such church.

In the cathedral church of Hereford the capitular body consisted at the time of the passing of the Act of a dean and five residentiary canons, who were called the "close chapter," and twenty-two non-residentiary canons, making up the "general chapter." One of the officers in the body was the prælector, who by customary right on a vacancy succeeded to one of the residentiary canonries, and a new prælector was appointed out of the non-residentiary canons by the close chapter.

(1) 13 Ir. C. L. Rep. at p. 548. (2) 1 F. & F. at p. 508.

1870

THE QUEEN v. DEAN OF HEREFORD.

The non-residentiary canons were appointed by the bishop. At York the dean alone appointed the residentiary canons from out of the non-residentiaries. Since the passing of the Act a prælector had been appointed at Hereford; and the last of those persons who were members of the close chapter at the passing of the statute having afterwards died, the bishop claimed under the statute to appoint direct to the vacant canonry residentiary. The prælector claimed to succeed to the vacancy on the ground that several who were members of the general chapter at the passing of the Act were still members:—

Held, that "chapter" meant the "close chapter:" for that it was the intention of the statute to preserve the vested rights of patronage alone, without any regard to the rights of the body out of which the selection was to be made; and the residentiary canonries therefore were now in the direct patronage of the bishop.

MANDAMUS to the Dean and Chapter of the cathedral church of Hereford commanding them to install in the office of canon residentiary in that church the venerable and reverend William Waring, who had been collated to the office by the bishop of the diocese.

A return having been made issue was joined on a plea traversing the several allegations in the return, and a case was stated for the opinion of the Court.

The allegations and facts sufficiently appear in the judgment of the Court.

Jan. 19, 26. *Sir J. B. Karslake, Q.C.* (*Dowdeswell, Q.C.*, and *Herschell*, with him), for the prosecution.

Patchett (with him *A. Stephens, Q.C.*), for the defendants.

Cur. adv. vult.

Feb. 21. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.) was delivered by

COCKBURN, C.J. This is a special case, stated after a return made by the dean and chapter of the cathedral church of Hereford to a mandamus commanding them to install the venerable and reverend Archdeacon Waring in the office of canon residentiary in that church, the said Archdeacon Waring having been collated to such office by the lord bishop of the diocese.

The return of the dean and chapter was to the effect that, prior to the Act of 3 & 4 Vict. c. 113, the chapter of the cathedral church of Hereford consisted of the dean, the bishop's prebendary, four canons or prebendaries residentiary, certain dignitaries of the

1870

THE QUEEN v. DEAN OF HEREFORD.

church and twenty-two canons or prebendaries non-residentiary. That of these the dean, the bishop's prebendary, and the four canons residentiary constituted the close chapter. That among the officers of the cathedral church was an officer termed the prælector, having certain spiritual duties attached to his office, which officer was by the constitution of the body appointed as of right by the close chapter out of the non-resident prebendaries; and that on a vacancy occurring in the canons residentiary (other than in the case of the bishop's prebendary, who was always appointed by the bishop), the prælector succeeded "accustomarily and of right" to the vacant residentiaryship. The return further proceeded to state, in order to shew that the state of things had not arisen upon which, by the 25th section of the Act of 3 & 4 Vict. c. 113, the right of appointing the canons residentiary was to be transferred to the bishop, that the Rev. Dr. Jebb, a non-residentiary prebendary, had been appointed to the office of prælector before that all the persons forming the close chapter at the time of the passing of the Act had ceased to be members of it; and, secondly, that of the persons who at that time were members of the general chapter seven still remained. The conclusion, therefore, was that the right of appointment had not passed to the bishop, and that the Rev. Dr. Jebb, who then claimed to be installed, was entitled to be so instituted, while Archdeacon Waring was not.

The statute in question, the 3 & 4 Vict. c. 113, by s. 25 enacts that "in the cathedral church of York, so soon as a vacancy shall occur in the deanery, and in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, and Wells respectively, so soon as every person who was a member of the respective chapters of such churches at the passing of this Act shall cease to be such member, all the said canonries shall be in the direct patronage of the Lord Archbishop of York and of the bishops of the said respective sees, as the case may be, who shall respectively, upon the vacancy of any canonry in such churches respectively, collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of the church to which he shall be so collated."

The question for our decision is, whether the event upon which, by effect of this enactment, the right of appointing a canon residentiary is to be transferred from the dean and chapter to the

1870

THE QUEEN v. DEAN OF HEREFORD.

bishop of the diocese, has arisen; and this again mainly turns on the construction which, with reference to the cathedral church of Hereford, is to be put on the word "chapter," as used in the foregoing section.

It appears from the special case that, prior to the passing of the Act, the general chapter of the cathedral church of Hereford consisted of the dean and five prebendaries or canons residentiary, twenty-two prebendaries or canons non-residentiary, and the archdeacon, and an officer of the cathedral named the prælector. As distinguished from the general chapter, the dean and the five canons residentiary formed also for many purposes a distinct chapter, sometimes termed the "close chapter." The government of the body was regulated by certain cathedral statutes of the reign of Charles I., commonly called the Caroline statutes, as also by certain customs and ordinances. The authority of the general chapter was exercised over certain matters affecting the general interests of the church. Thus their consent was necessary to any alteration of the cathedral statutes; as also to the removal of the prælector. They met twice a year at times appointed by the statutes. They were also convened for the receipt of the royal congé d' élire and for the election of a bishop in pursuance of it, as well as for the installation of the dean, prebendaries, and other dignitaries of the church, and the election of proctors in convocation.

On the other hand the residentiaries exclusively managed the capitular property and divided its revenues; they alone granted ecclesiastical leases, and confirmed the bishop's concurrent leases of the ecclesiastical property; they exclusively presented to all livings in the gift of the dean and chapter; they also appointed the prælector and all the other officers of the cathedral, except the dean, who was appointed by the Crown; they alone had the custody of the corporate seal, which they affixed to all documents, including those which issued from the general body.

Next, as to the appointment of the members of the capitular body. The appointment of the non-resident prebendaries was vested in the bishop, and from this body four of the five residentiary canons were exclusively selected. One of the five, commonly called the bishop's prebendary, was appointed by the bishop. When a vacancy occurred among the other four, by the estab-

1870

THE QUEEN v. DEAN OF HEREFORD.

lished custom, the prælector, an officer appointed by the close chapter out of the non-resident prebendaries, succeeded as of right, or at all events, as of course, to the vacant prebend, and a new prælector was appointed in his place by the close chapter. Thus the appointment of the residentiary canons, with the exception of the bishop's prebendary, was practically in the close chapter.

At the time of the passing of 3 & 4 Vict. c. 113, one of the residentiary prebends was vacant, and was, consequently, by the effect of s. 14 of the Act suppressed. Of the remaining four residentiary canons, one only, Canon Huntingford, remained alive in the year 1863. In that year a vacancy having occurred in the office of prælector, the Rev. Dr. Jebb, a non-residentiary canon, was appointed by the close chapter to that office, which he still holds. In 1867, Canon Huntingford, the last of the canons residentiary holding office at the passing of the Act, died. (1) Of the twenty-two non-resident prebendaries living at the passing of the Act, seven still survive. It follows that, according as the language of the Act which provides for the transfer of the patronage in respect of the residentiary prebends to the bishop, "so soon as every person who was a member of the chapter at the passing of the Act shall have ceased to be such member," was intended to refer, in the case of the cathedral church of Hereford, to the close chapter or to the general chapter, the event on which the transfer of the patronage is made to depend will, or will not, have occurred. If the word "chapter" refers to the close chapter, viz., the dean and residentiary canons, none of the then existing body any longer remain. (1) If it refers to the general chapter, several of that body are still alive and retain their prebends.

On the argument before us, it was insisted on the part of Archdeacon Waring, that all that was contemplated by the legislature in thus preserving the rights of the "chapter," was to save the vested right of patronage to the existing members of the close chapter, to whom the right of appointment exclusively belonged; the right of eligibility spread over so large an area being, as it was said, too small to have received attention or to have been deemed of sufficient importance to stand in the way of a change

(1) Dr. Mereweather, who was dean at the time of the passing of the Act, had died in 1850.

thought to be desirable. On the other hand, on the part of Dr. Jebb, on whose behalf the return was made, it was urged that the purpose of the reservation was to preserve all vested rights, and that the right of eligibility to a valuable preferment to the members of a limited body was an appreciable and valuable right, and one which parliament might well be presumed to have intended to respect.

The term "chapter" used in the Act, thus admitting of a two-fold construction, and its meaning appearing to us open to doubt, it occurred to us, before the close of the argument, that as, by the same enactment, in the case of the cathedral church of York, the appointment of the canons residentiary was directed to be transferred to the archbishop on the first vacancy in the deanery, without any reference to the chapter, if the fact should be as we had reason to think it was, that the patronage had previously been in the dean alone, but that he, like the Dean and Chapter of Hereford, had been limited in his selection to the non-residentiary canons, the provision in respect of the church of York would afford a solution of the meaning of the legislature in respect of the church of Hereford, as shewing that it was the vested right of patronage alone which the legislature intended to preserve. We accordingly remitted the matter to the learned gentleman by whom the case had been stated, requesting him to ascertain and inform us as to the state of things existing in the cathedral church of York at the time of the passing of the Act. We have since been furnished with a further statement from the learned arbitrator, from which it appears that from the passing of a cathedral statute of 8 Geo. 3, the appointment of the residentiary canons was exclusively in the dean, and that his choice was limited to the non-residentiary canons. It is plain, therefore, that all that the legislature intended in postponing the operation of 3 & 4 Vict. c. 113, to the next vacancy in the deanery, was to preserve the existing right of patronage without any regard to the rights of the body out of which the selection was to be made. We cannot suppose that there can have been any intention to make a distinction in this respect between the capitular body of Hereford and that of York; and with this indication of the intention of the legislature before us we are of opinion that, on the death of the last of the

1870

THE QUEEN v. DEAN OF HEREFORD.

canons residentiary living at the time of the Act passing, the enactment in s. 25 took effect, and the canonries passed into the direct patronage of the bishop.

It was however further contended that, as by the terms of the statute the new right of patronage was only to be exercised on a "vacancy" occurring, there was in the present instance no occasion for its exercise, there being no vacancy; inasmuch as Dr. Jebb having been elected to the office of prælector before the Act had come into operation, was entitled as of right to assume at once the office of residentiary canon.

We should not have been sorry to give effect to this contention, had it been possible; for one cannot but feel the hardship to a reverend gentleman, who has filled for so many years an office which has always hitherto been as of right the stepping-stone to a residentiary prebend, and who if any other vacancy save that created by the death of Canon Huntingford had occurred, would of course have succeeded to the canonry, in being disappointed in his reasonable expectation.

But we think the position thus taken by the defendants' counsel is untenable. The prælector was not a residentiary canon by virtue of his office; and though he succeeded to the canonry as of right, still it was only on a vacancy occurring that by virtue of the custom he stepped into the vacant canonry, and was entitled to be admitted and installed. It is impossible, therefore, to say that there was not a vacancy created by the death of Canon Huntingford within the meaning of the statute.

The result is that a peremptory mandamus must go to the dean and chapter to admit Archdeacon Waring to the vacant residentiary prebend.

Judgment accordingly.

Attorneys for prosecution: *Jones & Starling, for Beddoe, Hereford.*

Attorney for defendants: *Annesley.*

SMITH *v.* SYDNEY AND OTHERS.

1870
Feb. 12.

False Imprisonment—Arrest under ca. sa.—Judgment regularly signed, and afterwards set aside.

The defendants having issued a writ of summons against the plaintiff, specially endorsed, for 34*l.*, under the Common Law Procedure Act, 1852, s. 25, signed judgment, under s. 27, in default of appearance for the full amount and costs, and issued a ca. sa. indorsed for that amount, under which the plaintiff was arrested and paid the sum demanded. The plaintiff then applied at chambers to set aside the judgment on the ground that 16*l.* only was due to the defendants, and the master set aside the judgment on payment of costs by the plaintiff; the plaintiff then brought an action against the defendants for false imprisonment:—

Held, that as the judgment was regular, and as it must be taken that it was set aside as a favour to the plaintiff, and not for irregularity or any bad faith on the defendants' part, the action could not be maintained.

TRESPASS for an assault and false imprisonment.

Plea, that the defendants had recovered judgment against the plaintiff for 34*l.* 9*s.* and issued a writ of ca. sa. to the sheriff of Middlesex, and justified the trespass under that writ.

Replication, that the judgment was irregularly signed for the sum of 34*l.* 9*s.*, there being then only 16*l.* 1*s.* due from the plaintiff to the defendants as the defendants then well knew, and before this suit the judgment was for the cause aforesaid by an order duly made by one of the masters of the court set aside, and the money paid in excess of 16*l.* 1*s.* to the sheriff by the plaintiff was by the order ordered to be repaid less the costs of, and occasioned by, the application to the master.

Rejoinder, that the judgment was regularly signed in an action commenced by writ of summons by the defendants against the plaintiff, who then resided within the jurisdiction of the Court of Exchequer, in which the defendants claimed the sum of 34*l.* 9*s.* as a debt due to them from the plaintiff, and the defendants made upon the writ of summons, and a copy thereof, a special indorsement of the particulars of their claim in the form contained in the schedule A. to the Common Law Procedure Act, 1852, annexed, marked No. 4, and the plaintiff having been duly served with the writ and not having appeared thereto according to the exigency thereof, the defendants on filing an affidavit of personal service of the writ of summons signed final judgment in the form contained

1870

SMITH v. SYDNEY.

in the schedule A. to the said Act annexed, marked No. 5, for the sum indorsed on the writ and costs, which is the judgment in the plea mentioned, and afterwards in due time issued the execution in the plea mentioned, and after the issuing of the execution and the arrest and imprisonment of the plaintiff thereunder, as in the plea mentioned, the plaintiff served the defendants with the following judge's summons:—"Let the plaintiffs' attorney or agent attend me at my chambers in Rolls Garden on Monday next at 11 of the clock in the forenoon, to shew cause why the judgment signed herein, and all subsequent proceedings thereon, should not be set aside, and why the plaintiffs should not be ordered to repay to the defendant the sum of 15*l.*, part of a sum of 30*l.*, and the amount paid by the defendant for costs of action, execution, and sheriff's fees, on the ground that the only amount payable by the defendant was 15*l.* and no more, and that such judgment was signed in absolute bad faith after a promise by the plaintiffs that no proceedings should be taken on the writ, and after full notice to plaintiffs' attorney that 15*l.* only was due." And the plaintiff made an affidavit in support thereof that at the commencement of the action 16*l.* 1*s.* only was due from him to the defendants, and that he had paid to the sheriff of Middlesex under the execution the full sum recovered by the judgment; and thereupon Master Johnson, one of the masters of the Court, made the following order:—"I do order that the judgment signed herein be set aside, the money paid in excess of 16*l.* 1*s.* to the sheriff to be repaid, less the costs of, and occasioned by, this application." Which is the order in the replication mentioned, and so the defendants say that the judgment was not irregularly signed and was not set aside for irregularity.

Demurrer and joinder.

Dixon, for the plaintiff, in support of the demurrer. The judgment was set aside for irregularity; and it affords no protection to the defendants. The distinction in these cases is between a judgment set aside for irregularity and reversed on the ground of error. It is only when the judgment is reversed for error that it affords a protection: *Prentice* v. *Harrison* (1), *Collett* v. *Foster*. (2)

(1) 4 Q. B. 852. (2) 2 H. & N. 356; 26 L. J. (Ex.) 412.

1870

SMITH v. SYDNEY.

The action is not for maliciously signing judgment, but for trespass. In such an action, what is there to protect the defendants? It is said that there is a judgment, but there is no judgment, as by vacating the judgment it is as if it had never been. Even if the true meaning of the master's order is that the judgment should be left standing for the amount really due, still as that would reduce the amount below 20*l.*, no writ of capias could issue: *King* v. *Harrison* (1), *Brooks* v. *Hodgkinson.* (2) The rejoinder is therefore bad, and the action can be maintained.

J. Brown, Q.C. (*Castle* with him), for the defendants. The judgment was regular, and it was merely set aside on an affidavit of merits, as a favour, on payment of costs. That negatives the imputation of bad faith; it was not set aside for irregularity, for the rejoinder shews that the judgment was signed upon a writ specially indorsed under the Common Law Procedure Act, 1852, and therefore the defendants did no more than they were authorized to do. The distinction between setting aside the judgment for irregularity and reversing it for error, is well recognized; it is a distinction between the act of a party and the act of the Court: *Philips* v. *Biron.* (3) It was in that case objected on demurrer that though an erroneous judgment is a justification, yet an irregular one is not, for that is a matter of privity of the plaintiff and his attorney; and the Court likened it to a case of an administration where the administration is revoked and not reversed. In the case of error it is no fault of the party, but of the Court, and binds until reversed. So in *Williams* v. *Smith* (4), where an attachment issued for neglecting to obey an order of the Court of Chancery to deliver up papers, the Master of the Rolls thought that under the circumstances the attachment ought to go. The Lords Justices on appeal held otherwise, and set aside the attachment. An action of trespass having been brought, Williams, J. says (5): "If the attachment in this case had been set aside on the ground of irregularity, or that it was issued in bad faith, or in any other way equivalent to irregularity, I should have thought that both attorney and client would be liable for any imprisonment which took place under it;"

(1) 15 East, 612.
(2) 4 H. & N. 712; 29 L. J. (Ex.) 93.
(3) 1 Str. 509.
(4) 14 C. B. (N. S.) 596.
(5) 14 C. B. (N. S.) at p. 622.

1870

SMITH v. SYDNEY.

and after stating that the facts shewed that the judgment was not set aside for irregularity he proceeds: "That brings the case within that class of cases where it has been held that the party causing process to be issued, is not responsible for anything done under it where the process is afterwards set aside, not for irregularity but for error." Here judgment having been regularly signed and set aside, not for irregularity, nor on the ground of bad faith, notwithstanding it was set aside, it affords protection to the defendants.

Dixon, in reply.

MELLOR, J. I think our judgment ought to be for the defendants. The judgment was signed on a writ specially indorsed, and the present plaintiff might have prevented the judgment by entering an appearance. The judgment having been signed, he took out a summons to set it aside on the ground that the amount payable by him was 15*l.* only, and that the judgment had been signed in absolute bad faith after a promise that no proceedings should be taken on the writ. But the master, in setting aside the judgment on payment of costs by the plaintiff must be taken to have negatived the imputation of bad faith. There was no irregularity. The master treated it as a valid judgment, and set it aside at the instance of the then defendant as a matter of favour. We are bound to see on what grounds the judgment was set aside. Now the plaintiff fails in making out that it was set aside either on the ground of irregularity or because it was signed in bad faith. There is nothing to shew that the defendants were legally blameable for what they did. The case falls within the judgment of Williams, J., in *Williams* v. *Smith* (1), which is a correct exposition of the law, and the demurrer, therefore, must fail.

LUSH, J. I am of the same opinion. It is well established that an action does not lie in a case like this from the mere fact of a judgment being set aside. The Court must see the ground on which it is set aside. It may be set aside for irregularity, or because it was signed in bad faith, or on the ground of error. The authorities distinguish between an act of court and an act of parties, and it is only when the proceedings are set aside on the latter ground that the

(1) 14 C. B. (N. S.) 596, 622.

party is made a wrongdoer. Looking at the facts of this case, it appears that the master made his order to set aside the judgment, not on the ground of the misconduct of the defendants, but because judgment was signed for a larger sum than was actually due. He therefore interfered equitably at chambers to put the parties in their right position. The rejoinder shews that judgment was signed under the Common Law Procedure Act, 1852, on a writ specially indorsed; that judgment is, therefore, perfectly regular, and as valid as if the defendant had appeared to the writ and the cause had gone to trial, and the defendant not appearing had a verdict against him for the full amount. This judgment under the Common Law Procedure Act, 1852, is as much the act of the Court as a verdict recorded at a trial. The master's act is tantamount to setting right an erroneous act of the Court, and the defendants are not trespassers.

1870

SMITH v. SYDNEY.

HANNEN, J. The mere fact of a judgment being set aside does not deprive the party to the suit of his protection, otherwise it would be sufficient, in answer to a plea of justification under the judgment, to reply nul tiel record. That is not sufficient; it is necessary to shew why the judgment was set aside, and therefore the facts are pleaded specially. In the present case the judgment was not set aside for irregularity, but as a favour to the plaintiff on payment of costs; therefore, although the judgment is set aside, yet it still affords a protection to the defendants.

Judgment for the defendants.

Attorney for plaintiff: *Sykes.*
Attorney for defendants: *Sydney.*

1870
Feb. 21.

IN THE MATTER OF A PLAINT OF IRVING *v.* ASKEW.

County Court—Alteration by Judge of Judgment—Refusal by Judge to sign Case for Appeal—Rule 192 *of* 1867—13 *&* 14 *Vict. c.* 61, *s.* 15—19 *&* 20 *Vict. c.* 108, *s.* 32—*Practice.*

4CPD430

A county court judge cannot, except by consent or after a new trial, alter a judgment which he has formally given.

By s. 15 of 13 & 14 Vict. c. 61, an appeal from a county court shall be in the form of a case agreed upon between the parties, "and if they cannot agree, the judge of the county court . . . shall settle the case and sign it." Rule 192 of the County Court Rules of 1867 provides that "all cases on appeal shall . . . be presented to the judge for signature" within a certain time, "and shall then be signed by the judge and be sealed with the seal of the Court":—

Held, that Rule 192 is not repugnant to s. 15, and is therefore valid; and a county court judge is bound under this rule to sign and seal a case on appeal agreed on between the parties, if the case correctly states the facts and the judgment.

RULE, calling on the Judge of the County Court of Cumberland, holden at Cockermouth, and the plaintiff, to shew cause why the judge should not sign and seal an appeal case in the plaint of *Irving* v. *Askew*, the case having been agreed to by the attorneys of the parties.

The plaint was brought by the plaintiff Irving as assignee of one Trainer, a bankrupt, against the defendant, as clerk of the Workington Local Board, for the conversion by the board of certain plant and materials formerly the property of the bankrupt. The defence set up was that the bankrupt had entered into a contract with the board for the execution of certain works, and that by one of the provisions of the contract it was provided that in certain events (which it was admitted had happened) it should be lawful for the board to take possession of all plant and materials upon the works belonging to the contractor, and to complete the works, and that the plant and materials, the subject of the plaint, were taken possession of under the above provisions; and it was contended that the property in the plant and materials had thereby become vested in the board.

On the 29th of July, 1868, the county court judge gave judgment for the plaintiff for 50*l.*, the joint value of the plant and materials. A minute of the judgment was duly entered on the proceedings of the court in the book kept for that purpose. The defendant being

1870

IRVING v. ASKEW.

dissatisfied with this judgment in point of law, gave due notice of appeal, and entered into the requisite security to prosecute the appeal, and a case setting forth the questions for the opinion of the superior court was agreed upon between the attorneys for the respective parties. The case so agreed upon was duly submitted to the judge for his signature at the court succeeding that upon which judgment had been given. The judge adjourned the signing of the case from time to time until the 14th of February, 1869, when he refused to sign the case, stating that he had altered his judgment, and wished the parties to alter the case accordingly. The defendant objected to this. The judge continued to refuse to sign the case so agreed on between the parties, and the present application was ultimately made to compel him to do so, in conformity with the 192nd rule of the County Court Rules, 1867 (1), made under the powers of 19 & 20 Vict. c. 108, s. 32. The county court judge did not suggest that the case incorrectly stated the facts or his judgment; but he wished to alter the case by giving judgment for the plaintiff for the value of the plant only.

No evidence was given at the trial of the value of the plant as distinguished from that of the materials, and no new trial was asked for or ordered. (2)

Nov. 24, 1869. *Kemplay* shewed cause (3) on behalf of the county court judge. (4) This application is made to compel the judge to act as required by Rule 192 of 1867. (1) That rule is void, because it is repugnant to s. 15 of 13 & 14 Vict. c. 61. (5) That section only requires the judge to sign when the parties cannot

(1) Rule 192 of the County Court Rules, 1867, provides that "all cases on appeal shall, unless the judge shall otherwise order, be presented to him for signature at the court holden next, after the expiration of twelve clear days from the day on which judgment was pronounced, and shall then be signed by the judge, and be sealed with the seal of the court."

(2) The affidavits stated many other facts, but those mentioned in the text are the facts upon which the judgment was given.

(3) In the Bail Court, before Hannen, J.

(4) The plaintiff did not appear.

(5) 13 & 14 Vict. c. 61, s. 15, enacts that appeals from county courts shall be "in the form of a case agreed upon by both the parties or their attorneys, and if they cannot agree, the judge of the county court, upon being appealed to by them or their attorneys shall settle the case and sign it. . . ."

1870

IRVING v. ASKEW.

agree; and the section cannot be altered by county court rules, although they are drawn up under a statute. (1) The rule is inconsistent with the section, because it requires that *all* cases shall be signed by the judge. It is, therefore, invalid: *Hacking* v. *Lee.* (2) Secondly, the judge was not bound to sign a case which did not correctly state the judgment which he thought ought to be given. He was entitled to refuse to do so, although he had originally given judgment as stated in the case presented to him for signature.

Field, Q.C., and *Waddy*, in support of the rule. Rule 192 is not inconsistent with s. 15 of 13 & 14 Vict. c. 61. It provides for a case not noticed by the section. There is nothing in the section to shew that the legislature desired that the judge should not sign cases agreed upon between the parties. The section enacts that the judge shall sign those cases as to which the parties cannot agree. The rule adds to this the additional provision that the judge shall also sign cases on which the parties are agreed. This is a reasonable rule which provides in a convenient manner for the authentication of cases agreed upon by the parties. This point is, in effect, decided by *Furber* v. *Sturmey* (3), where a county court judge was held bound to sign a case under Rule 145 of the County Court Rules, 1857, which was in the same terms as Rule 192 of 1867. Secondly, the judge had no power to alter his judgment after it was once formally delivered, except by consent, or after a new trial. His duty is the same as to signing a case, whether he approves or disapproves of the judgment which he has given. Consequently he was bound to sign this case.

Cur. adv. vult.

Feb. 21. HANNEN, J. (after stating the facts of the case as before set out):—It was not contended on the part of the county court judge that the case as agreed on between the parties in any way incorrectly stated the facts or his judgment, but he desired to alter it by giving judgment for the plaintiff for the value of the plant only. As, however, no evidence had been offered at the trial of the value of the plant as distinguished from the mate-

(1) 19 & 20 Vict. c. 108, s. 32.
(2) 2 E. & E. 906, 910; 29 L. J. (Q.B.) 204, 206.
(3) 3 H. & N. 521; 27 L. J. (Ex.) 453.

rials, the alteration proposed by the judge could not be made without the consent of the parties, and their agreement as to the value of the plant; and the defendant has refused to give his consent to any such alteration. The only way in which the error, if error it was, could be properly corrected, would have been by a new trial, at which proper evidence might have been given of the value of the plant; but no new trial was ever ordered or asked for; and if, having given judgment, the judge attempts to rescind it, he subjects himself to prohibition: *Jones* v. *Jones*. (1)

The judgment of the county court judge being once given he is functus officio, except in so far as further powers are conferred upon him by the statutes regulating the proceedings of his court. Thus, a new trial having been once refused, he cannot afterwards grant one on changing his mind: *Great Northern Ry. Co.* v. *Mossop*. (2) The position of the county court judge in the present case may be likened to that of a judge at nisi prius, to whose ruling a bill of exceptions has been tendered but not signed till after verdict. If in such a case the judge should come to the conclusion that he had been mistaken, he could not on that account refuse to sign the bill of exceptions and require the complaining party to agree upon a state of facts to which his altered view would be applicable, and compel an appeal to the Exchequer Chamber, not on the ruling really given and objected to, but on the amended ruling which the judge subsequently considered he ought to have given.

It was further urged on behalf of the county court judge, that the 192nd Rule was repugnant to s. 15 of 13 & 14 Vict. c. 61, and therefore invalid. If the rule were really repugnant to the provisions of the Act of Parliament, I should think that the rule, though made under the powers of the Act, would not override its enactments; see per Crompton, J., in *Hacking* v. *Lee* (3), but I do not see that such repugnance exists. Section 15 enacts that the "appeal shall be in the form of a case agreed on by both parties or their attorneys, and if they cannot agree, the judge of the county court shall settle the case and sign it." This does not provide any mode of authenticating a case agreed on by the parties. But it does

(1) 5 D. & L. 628; 17 L. J. (Q.B.) 170.

(2) 17 C. B. 130; 25 L. J. (C.P.) 22.

(3) 2 E. & E. at p. 910; 29 L. J. (Q.B.) at p. 206.

1870

IRVING v. ASKEW.

not exclude the making of any rule or regulation on that subject if it should be found necessary to do so, and I think that good reasons may be given for requiring that the judge should sign the case even though the parties have agreed upon it. One object of the rule may be to give the judge an opportunity of correcting any mistake into which the parties may have fallen, and if in the present case the judge had refused to sign on the ground that the case did not correctly represent the facts, or his ruling upon them, I should have thought him justified; but in the absence of any proof or even suggestion of misstatement in the case, I think he was bound to comply with the rule and affix his signature to the case. The case of *Furber* v. *Sturmey* (1) is an authority in favour of this view. There, Martin B., says (2), "Under the Act and rule in question, the judge would not be bound to sign a case which he did not think correctly stated." But as the judge did not there allege that the case was incorrect, but refused to sign on other and insufficient grounds, the Court of Exchequer confirmed an order of Watson, B., directing the county court judge to sign the case, and granted an attachment against him for refusing to do so.

For these reasons, I am of opinion that this rule must be made absolute.

Rule absolute.

Attorney for defendant: *R. Wood.*

Attorneys for county court judge: *Bischoff, Bompas, & Bischoff.*

(1) 3 H. & N. 521; 27 L. J. (Ex.) 453. (2) 3 H. & N. at p. 524.

[IN THE EXCHEQUER CHAMBER.]

1870
Feb. 4.

FREND *v.* BUCKLEY.

Vendor and Purchaser—Abstract of Title—Sale of Leaseholds—Non-production of Lease more than Sixty Years Old.

Upon a sale of leasehold property without any condition protecting the vendor against the production of deeds, the vendor is bound to produce the lease which is the root of his title, although the lease is more than sixty years old.

APPEAL from the decision of the Court of Queen's Bench refusing a rule to enter a nonsuit.

The action was brought to recover 400*l.*, being the deposit paid by the plaintiff upon the purchase by him from the defendant of certain freehold and leasehold lands, and also 59*l.* 16*s.* 4*d.*, being the expense of investigating the title.

The plaintiff, on the 8th of January, 1868, entered into an agreement with the defendant for the purchase (subject to a mortgage of 5000*l.*) of certain lands situate at Ifield Crawley, in the county of Sussex, of which fifty-eight acres were freehold, and ninety-four were leasehold, for the residue of a term of 1000 years from Michaelmas, 1599, at the rent of one penny, for the sum of 3575*l.*, 400*l.* to be paid as a deposit, and in part payment of the purchase money.

The agreement contained certain conditions of sale by which the defendant (amongst other things) agreed to "deduce a good and marketable title," but it did not contain any condition by which the defendant was protected against the production of deeds not in his possession.

The abstract of title relating to the leaseholds commenced with an indenture dated the 13th of September, 1800, made between Henry Blunt, of the one part, and George Hutchinson, of the other, and which recited that by an indenture dated the 20th day of January, 1606, and made between Sir Anthony Mayne, George Blencoe, and Henry Hault, of the one part, and J. Middleton, of the other part, for the considerations therein mentioned, the parties thereto of the first part did demise, grant, and to farm let unto J. Middleton, his executors, administrators, and assigns, all

1870

FREND v. BUCKLEY.

those messuages, mills, cottages, farms, orchards, gardens, lands, tenements, and hereditaments, with, &c., called by the name of Ifield Forge, Ifield Furnace, and all other the mills, messuages, lands, and tenths, theretofore demised by Anthony Mayne unto A. Middleton and J. Middleton, and also the lands and tenths called by the name of Peymisgham, and also all other the messuages, lands, tenths, and other hereditaments of them the parties thereto of the first part, in the parish of Ifield, containing 574 acres, to hold unto J. Middleton, his executors, administrators, and assigns, from Michaelmas, 1599, unto the full end and term of 1000 years, under the yearly rent of one penny, payable on Michaelmas Day, only if demanded, and the parties of the first part did bargain and sell unto the party of the second part all the woods and underwoods standing, growing, and being on the said demised premises, and every part thereof. And it also recited that by an indenture dated the 4th of January, 1715, ninety-five acres of land, a portion of 574 acres, was assigned by John Middleton unto Leonard Gale for the residue of the term of 1000 years. And after further recitals, which are not material, George Blunt, by the indenture of 1800, assigned the ninety-five acres of land unto George Hutchinson. The abstract then shewed that the property had been dealt with by divers mesne assignments, and the equity of redemption, the property having been previously mortgaged, was assigned by deed in 1867 to the defendant.

Requisitions on the title were sent to the defendant, and amongst others the following:—1. "When and where will the several deeds, wills, &c., which are abstracted in chief, and the lease of the 20th of January, 1606, be produced for examination with the abstract." To this requisition the defendant sent the following reply: "The production of a deed more than sixty years old cannot be insisted upon. See *Prosser* v. *Watts*." (1)

No further replies to the requisitions having been furnished the plaintiff rescinded the contract in consequence of the defendant declining to produce the lease, dated the 20th of January, 1606.

At the trial before Hannen, J., at the Middlesex sittings in Trinity Term, 1868, a verdict was entered for the plaintiff for 459*l.* 16*s.* 4*d.*, with leave to the defendant to move to enter a nonsuit.

(1) 6 Madd. 59.

The defendant accordingly moved for a rule, which the Court of Queen's Bench refused.

Nov. 27, 1869. *Mellish, Q.C.* (*Morgan Lloyd* with him), for the defendant, contended that the production of a lease more than sixty years old cannot be insisted on by a purchaser.

Joshua Williams, Q.C. (*Mathew* with him), for the plaintiff, contended that the plaintiff having purchased a leasehold interest the creation of the term ought to be shewn; that the lease of 1606 was the root of the defendant's title, and ought, therefore, to be produced. He referred to Sugden's V. & P., 14th ed. p. 370, s. 21, and p. 410, s. 25; Dart's V. & P., 3rd ed. p. 191; 1 Jarm. Conv., by Sweet, 69; 1 Prest. Abs. 11.

Mellish, Q.C., replied.

Cur. adv. vult.

Feb. 4. The judgment of the Court (Kelly, C.B., Willes and Keating, JJ., Channell, Pigott, and Cleasby, BB.) was delivered by

KELLY, C.B. We must give judgment in this action upon the question really raised by the facts as stated in the case. Another question was discussed in argument, viz., the sufficiency of certain recitals in ancient deeds as proof of the origin of a leasehold interest when the lease itself, or an attested or other copy of it, could not be produced. But the only question raised upon the case is, whether the answer given by the defendant to the first requisition or title made by the plaintiff was sufficient.

The requisition and answer were as follows:—[The Lord Chief Baron read the first requisition and the answer.]

Taking this requisition and the answer together, the contention of the vendor must be that, in the case of an absolute unconditional contract for sale of leaseholds, where the lease is alleged to be more than sixty years old, it is enough for the vendor to shew an assignment or series of assignments reciting the parcels, words of demise, and reddendum of the lease only, and not purporting to recite the whole lease, accompanied by sixty years' possession consistent with such assignments, that the original lease or a copy of it need not be produced, nor any further evidence of its contents

1870

FBEND v. BUCKLEY.

given, that the purchaser is bound to accept such proof of title to the term, taking his chance of the undisclosed contents of the lease, and that he is not entitled to satisfy himself either by seeing the lease or otherwise that it gives what he has bargained for, namely, a clear title to the term, without onerous covenants or conditions constituting substantial infirmity in the title such as would justify its rejection.

In determining the question thus raised, it ought to be dealt with as a general one affecting all leaseholds more than sixty years old, and it was so treated in the answer to the requisition. Upon the argument, indeed, reliance was further placed upon the special circumstances of this case, upon the alleged great antiquity of the particular lease, the small amount of the rent, the peculiar language of the reservation, the probable object of the creation of the term being to raise money, in support of which speculation the history of leases for long terms might be referred to, see Lord Hardwicke's judgment in *Willoughby* v. *Willoughby* (1), and of which the sale of the timber in this case was also said to be some evidence. As a counterpoise to this sort of argument may be adduced the uncertainty and consequent litigation that will follow if each case is to be decided according to its special circumstances, making it more or less likely or unlikely that the lease, if its whole contents were disclosed, would shew a good title; more or less likely that the reversioner could or would take advantage of any defect; more or less likely that there was any reversioner, or that the Crown had become entitled in default, and so forth. In some cases such considerations might seem frivolous; in others weighty. They are more proper for the discretion of the purchaser and his advisers before he makes his bargain and incurs expense, and it is competent to the vendor to exclude all subsequent reference to them by a simple condition that the purchaser shall be satisfied with the recital of the lease in the assignment or assignments (specifying it or them), without requiring production of the lease, or proof that it is lost, or a copy or proof of its contents, further than such recital affords—a precaution which in this case was not adopted.

Upon the sale of a lease, less than sixty years old without con-

(1) 1 T. R. 763.

dition, the purchaser would be entitled, and it would be part of the duty of his solicitor to require, amongst other things, proof of the contents of the lease, and the vendor would not fulfil his obligation to shew a good title without affording such proof. No authority was cited for making the distinction now contended for in favour of the vendor of a lease more than sixty years old, nor is there any sound reason for doing so, considering that the limitation to sixty (or, as has been suggested by great authority, forty) years in the case of sales of fee simple estates is founded upon the effect of the statute of limitations. But it must be remembered that the statute does not begin to run against the reversioner after a term of years before the expiration of the term, or a forfeiture of which the reversioner elects to take advantage. This consideration distinguishes the present case from that of *Prosser* v. *Watts* (1), where the purchaser of a fee simple estate required the inspection of deeds recited in conveyances included in an abstract, which without such recitals would have shewn a good and sufficient title, upon the ground that the recitals were constructive notice of the deeds and their contents, and that these might perhaps shew something to prejudice the title which, without them, was complete. In the present case the lease partially recited is the root of the title, and without the recital there would have been nothing to shew that the thing contracted to be sold, namely, a subsisting term (not a mere chance of not being ejected) had any existence.

It would be extravagant to hold that, upon an absolute unconditional sale in 1868 of a lease for 1000 years made in 1606, the purchaser was bound to accept a title founded upon a recital of part of that lease in an assignment to the vendor in 1867, though accompanied by a possession consistent with the lease, but also consistent with its containing provisions making it in effect something different from what was contracted to be sold.

To bind the purchaser to accept such ambiguous proof of title there ought in justice to be a condition apprising him that he must be content not only without the lease, but without knowing all its contents; and it is more convenient and more reasonable to require that, where circumstances of such a character exist, the difficulty should be anticipated by such a condition which it is in

(1) 6 Madd. 59.

1870

FREND v. BUCKLEY.

the power of the vendor in the first instance to impose, and the like of which are constantly used to meet similar contingencies, than that it should be open to a vendor, upon every sale of a lease more than sixty years old, to litigate the question whether it was reasonable that he should be prepared to produce it, or, accounting for its absence, to prove its contents.

The vendor not having in this case imposed such a condition, and not having by production or proof, however slight, of loss, and that no complete copy exists or otherwise, shewn the purchaser a title to that which he professed to sell, but having insisted only that he was not bound to produce a lease more than sixty years old, the purchaser is entitled to retain the judgment given in his favour in the Court of Queen's Bench, which ought therefore to be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Palmer, Palmer, & Bull.*
Attorneys for defendant: *Smith & Co.*

Feb. 21.

GIBSON *v.* THE MAYOR, ALDERMEN AND BURGESSES OF PRESTON.

Highway—Local Board of Health—Liability to Action for Non-repair of a Road—Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 68—"*Highway Repairable by Inhabitants at large*"—15 & 16 *Vict. c.* 42, *s.* 13.

An action for personal injuries sustained by one of the public owing to the non-repair of a highway, does not lie against a local board of health constituted under the Public Health Act, 1848.

By s. 13 of 15 & 16 Vict. c. 42, the term "highway" in s. 68 of the Public Health Act, 1848, by which highways are vested in the local board, shall mean "any highway repairable by the inhabitants at large":—

Held, that the words "repairable by the inhabitants at large" are used in contradistinction to repairable by individuals ratione tenuræ; and that on demurrer to a declaration alleging it was the duty of a local board to repair a public footpath, it must be taken that it was a highway repairable by the inhabitants at large.

DECLARATION, that the provisions of the Public Health Act, 1848, were applied to the borough of Preston, and the defendants thereupon became the Local Board of Health for the borough, and

that there was within the borough and within the district for which the defendants are such local board, a public footway called Syke Road, which, under the provisions of the statute, and other statutes in that behalf, it was the duty of the defendants as such local board to level and repair, as and when occasion might require, and that the public footway was, for want of necessary levelling and repairing, ruinous and out of repair, and dangerous to persons lawfully using and passing along the same. And the defendants wrongfully permitted the same to be and remain so ruinous, out of repair and dangerous, by reason whereof the plaintiff, whilst lawfully using and passing along the public footway, was thrown down, and broke his leg, and sustained great injuries.

Demurrer and joinder.

Nov. 9, 1869. *Sir J. D. Coleridge, S. G.* (*R. G. Williams* with him), in support of the demurrer.

Mellish, Q.C. (*Manisty, Q.C.*, and *Kemplay*, with him), contra.

The arguments sufficiently appear from the judgment of the Court.

The cases and the statutes cited are also fully referred to.

Cur. adv. vult.

Feb. 21. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.) was delivered by

HANNEN, J. This is an action against the mayor, aldermen, and burgesses of Preston, who are the local board of health within that borough, under the provisions of the Public Health Act, 1848 (11 & 12 Vict. c. 63), for permitting a certain public footway in their district, which it was their duty to keep in repair, to be out of repair, whereby the plaintiff was injured. The defendants demurred to the declaration, and contend that it discloses no ground of action against them.

By the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 68, it is enacted, that all streets being or which shall at any time become highways within any district shall vest in and be under the management and control of the local board of health. By 15 & 16 Vict. c. 42, s. 13, it is enacted that the term "highway" in the

1870

GIBSON v. MAYOR OF PRESTON.

above section shall mean any "highway repairable by the inhabitants at large."

It was contended on the part of the defendants that it did not appear that the footway in question was a highway repairable by the inhabitants at large. We are of opinion, however, that the words "repairable by the inhabitants at large" are used in contradistinction to repairable by individuals ratione tenuræ, and that it must be taken on demurrer that the declaration, which alleges that it was the duty of the defendants to repair the footway, thereby sufficiently avers that it was a highway repairable by the inhabitants at large: as such duty could not otherwise exist.

Secondly, it was argued that the defendants are not liable otherwise than as a surveyor of highways would be, and that against such an officer no action can be maintained for an accident arising from his neglect to repair a highway. This argument was based upon s. 117 of the Public Health Act, 1848, and the case of *Young* v. *Davis* (1) affirmed in the Exchequer Chamber. (2) By the section referred to, it is enacted that the local board of health, within the limits of their district, shall exclusively execute the office of surveyor of highways, and have all such powers, duties, and liabilities as any surveyor is now or may be hereafter invested with or liable to. In the case of *Young* v. *Davis* (1), it was held that no action lies against a surveyor of highways appointed under the 5 & 6 Wm. 4, c. 50, for damage resulting from an accident caused by his neglect to repair the highway, upon the ground that although the legislature imposed on the surveyor the duty of repairing the roads, yet that as this was only as the officer of the parish, and no action could be brought against the parish, it could not be supposed that it was the intention of the legislature that such an action should be maintainable against the officer, and this view was adopted by the Court of Exchequer Chamber. Willes, J., in delivering judgment, says (3): "This Act of Parliament appears not to have been passed for the purpose of creating a new liability either in the parish or any other persons, but simply in order to provide machinery whereby the existing duty of the parish may be conveniently fulfilled."

(1) 7 H. & N. 760; 31 L. J. (Ex.) 250. (2) 2 H. & C. 197.
(3) 2 H. & C. at p. 198.

The case of *Parsons* v. *St. Mathew, Bethnal Green* (1), was cited to shew that the immunity from action which the surveyor enjoyed belonged also to a corporate body to whom the duties and liabilities of surveyor are transferred. It was there held that an action for non-repair of a highway would not lie against a vestry appointed under the Metropolis Local Management Act (18 & 19 Vict. c. 120), on the ground that the liabilities of the parish were not transferred or taken away, although the right and liability of the surveyor (with additional powers) were transferred to the vestry (s. 96); and therefore it was held that, as the surveyor had been previously exempt from action, so the vestry continued.

For the plaintiff it was admitted, that if the duties of the local board were only those of the surveyor, the decision in *Young* v. *Davis* (2) would be applicable, and the action could not be maintained; but it was contended that the local board was not merely in the place of the surveyor, by virtue of s. 117, but that it was also, by virtue of s. 68, in the place of the parish. It was further contended, that the effect of s. 68 was altogether to take away liability from the parish, and to transfer it to the local board, and that, as the local board is a corporation, the technical difficulty which formerly stood in the way of suing a parish or county, *Russell* v. *Men of Devon* (3), was removed, and an action might be maintained against the local board for the neglect of a statutable duty imposed upon it, as in the case of *Hartnall* v. *The Ryde Commissioners.* (4) In support of this argument, the case of *Henly* v. *Mayor, &c., of Lyme* (5) was cited. That case is, however, distinguished by Martin and Channell, BB., in *Young* v. *Davis* (2), and does not affect the question we have now to consider, namely, what was the intention of the legislature in enacting ss. 68 & 117 of the Public Health Act, 1848.

On consideration of that statute in connection with the previous state of the law with reference to which it was passed, we are of opinion that the plaintiff is not entitled to recover. At common law, no action could be maintained by one of the public in respect

(1) Law Rep. 3 C. P. 56.
(2) 7 H. & N. 760; 31 L. J. (Ex.) 250; in error, 2 H. & C. 197.
(3) 2 T. R. 667.
(4) 4 B. & S. 361; 33 L. J. (Q.B.) 39.
(5) 5 Bing. 91.

1870

GIBSON v. MAYOR OF PRESTON.

of injury sustained through a highway being out of repair. It is true that in *Russell* v. *Men of Devon* (1), the argument chiefly insisted on was that the action would not lie, because the inhabitants of a county are not a corporation, and therefore cannot be sued collectively; but the reason relied on by Lord Kenyon, C.J., and Ashurst, J., was not so much the technical one referred to as that which is expressed in Bro. Abr. tit. Action on the Case Pl. 93. That passage is thus explained and paraphrased by Alderson, B., in *M'Kinnon* v. *Penson* (2):—"That inasmuch as the highway ought to be repaired by the public, an injury arising from that neglect cannot be the subject of an action, but is only ground for the Crown interfering."

But whatever the reason was the fact remains, that no action could be maintained for an injury arising from the non-repair of a highway by the parish, and the legislature has not interfered by any general enactment to give a remedy by action, to persons sustaining such an injury. It is therefore incumbent on a plaintiff who seeks to establish that such a right is exceptionally given to persons sustaining an injury in a particular district, to shew distinctly that the legislature had such an intention in passing the enactment to which such an effect is attributed. The Court of Exchequer held in *M'Kinnon* v. *Penson* (3), that such an intention could not be inferred from the very comprehensive language of the 43 Geo. 3, c. 59, s. 4, which enacts that the county may be sued in the name of their surveyor. This was held not to create a new liability, but only to afford a more convenient remedy in cases, if any, in which the county would be liable, and this construction, founded on the presumed intention of the legislature, though with difficulty to be collected from its language, was upheld by the Court of Exchequer Chamber. (4) Again, in *Young* v. *Davis* (5), the Court of Exchequer, confirmed by the Court of Exchequer Chamber (6), held that an intention to give a right of action for injury resulting from non-repair could not be inferred from the language of the 5 & 6 Wm. 4, c. 50. Again, in *Parsons*

(1) 2 T. R. 667.
(2) 8 Ex. at p. 321.
(3) 8 Ex. 319; 22 L. J. (M.C.) 57.
(4) 9 Ex. 609; 23 L. J. (M.C.) 97.
(5) 7 H. & N. 760; 31 L. J. (Ex.) 250.
(6) 2 H. & C. 197.

v. *St. Mathew, Bethnal Green* (1), the Court of Common Pleas held that such an intention could not be inferred from the language of 18 & 19 Vict. c. 120. And again, in *Wilson* v. *Mayor, &c., of Halifax* (2), Kelly, C.B., while deciding the case on another point, says, "should a case arise in which the question shall be whether the 68th section of the Public Health Act, 1848, imposes upon the local authority the liability to be sued in a civil action for damages, by reason of a failure to perform a duty assigned to them by the Act, we should pause before we could hold that in addition to the well-established remedy by indictment every individual among the public would have a right of action for any and every injury resulting from such breach of duty."

In the case of *Hartnall* v. *Ryde Commissioners* (3), however, this Court did draw the inference that the legislature, by the language of the particular local Act, intended to give a right of action against the defendants for an injury resulting from a breach of their duty to repair streets; but the enactment in that case was peculiar, inasmuch as it provided by s. 49 that the commissioners should be deemed guilty of a misdemeanour for refusing or neglecting to repair any public highway within the limits of the special Act, and should be liable to be indicted for such misdemeanour in the same manner as the inhabitants thereof, or of any parish, were liable before the passing of the Act. It was held that these enactments took away the liability of the parish to do the repairs, and cast it upon the new body, with all the ordinary incidents, including liability to be sued, resulting therefrom. There is no such provision in the Public Health Act, 1848. The enactment that the streets shall "vest in" the local board, whatever meaning may be assigned to that expression, does not seem to us to enlarge the liability resulting from the following words, that they shall be "under the management and control of the local board," language similar to that used in the statute under consideration in *Rex* v. *St. George, Hanover Square* (4), where it was held, that the imposing of the duty of repairing on a person or body other than the parish did not, by implication, exempt the parish from liability to indictment; and while this liability remains, the

(1) Law Rep. 3 C. P. 56.
(2) Law Rep. 3 Ex. 114, 119.
(3) 4 B. & S. 361; 33 L. J. (Q.B.) 39.
(4) 3 Camp. 222.

1870

GIBSON v. MAYOR OF PRESTON.

cases above referred to, *Young* v. *Davis* (1), and *Parsons* v. *St. Mathew, Bethnal Green* (2), established that no right of action is created against those to whom the management and control of the roads is given.

For these reasons we are of opinion that the legislature did not intend by the Public Health Act, 1848, to give to a person in the position of the plaintiff a right of action which did not previously exist, and our judgment must, therefore, be for the defendants.

Judgment for the defendants.

Attorney for plaintiff: *C. J. Allen.*
Attorney for defendants: *E. W. Le Riche.*

Feb. 14.

FOSTER, APPELLANT; TUCKER, RESPONDENT.

Turnpike—Exemption from Toll—Artificial Manure in Cart of Dealer—5 & 6 Wm. 4, c. 18, s. 1.

A waggon of the seller conveying artificial manure to the farm of the purchaser is within the exemption from turnpike toll in 5 & 6 Wm. 4, c. 18, s. 1, as "a carriage employed in conveying manure for land."

So *held*, on the authority of *Reg.* v. *Freke* (5 E. & B. 944; 25 L. J. (M.C.) 64).

CASE stated by Justices of Wilts under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant, a toll collector at a turnpike gate, charging him with having taken illegal toll from one John Trimby, viz., 1*s.* for a waggon, drawn by two horses, passing through his gate, the waggon and horses being exempt from toll by 5 & 6 Wm. 4, c. 18, s. 1. (3)

John Rebbeck, a farmer, ordered of one Charles Prangley, a dealer in artificial manures, a load of manufactured manure, viz., superphosphate of lime, for his land. The manure was forwarded

(1) 7 H. & N. 760; 31 L. J. (Ex.) 250; in error, 2 H. & C. 197.

(2) Law Rep. 3 C. P. 56.

(3) 5 & 6 Wm. 4, c. 18, s. 1. . . . "No toll shall be demanded or taken on any turnpike road for or in respect of any horse, beast, cattle, or carriage, when employed in carrying or conveying only dung, soil, compost, or manure for land (save and except lime) or the necessary implements used for filling the manure, and the cloth that may have been used in covering any hay, clover, or straw, which may have been conveyed."

Lime used in agriculture is exempted from toll by most of the local Acts; and see 3 & 4 Vict. c. 51, and 13 & 14 Vict. c. 79, s. 3.

1870

FOSTER v. TUCKER.

to Rebbeck in a waggon with two horses belonging to Prangley, and had to pass through the appellant's gate, and Trimby, the driver, claimed exemption, but the appellant would not let him pass till he had paid the poll.

It was contended, on the part of the appellant, that the artificial manure was liable to toll, inasmuch as it was manufactured merchandise, and had not passed from the dealer's hands; and that Prangley was not, as such manufacturer and dealer, entitled to exemption from toll.

The justices were of opinion that manure for land was exempt from toll when on its carriage to the land, whether carried by the owner of the land or the person of whom it was purchased; and they convicted the appellant accordingly.

The question for the Court was, whether artificial manure being conveyed to the farmer by the manufacturer and seller is exempt from toll.

A. De Rutzen, for the appellant, contended that the intention of the legislature, as evidenced by the latter part of s. 1 of 5 & 6 Wm. 4, c. 18 (1), was only to exempt the waggon of the farmer carrying manure to his fields; but he admitted that the case of *Reg.* v. *Freke* (2), though decided under a local statute, was scarcely distinguishable from the present case, and it was there held that the exemption, given in similar words, extended to the carts of the dealer.

Snowden, for the respondent, was not heard.

LUSH, J. The words of exemption in the section are very general; superphosphate of lime is expressly found by the case not to be lime, but manure, though manufactured. We must give full effect to the words of the exemption; and the case referred to shews that it is immaterial whether the manure be in the cart of the agriculturist or of the dealer.

HANNEN, J., concurred.

Judgment for the respondent.

Attorneys for appellant: *Sandys & Knott, for Johns & Trail, Blandford.*

Attorneys for respondent: *Venning, Robins & Venning, for Cobb & Smith, Salisbury.*

(1) See ante, p. 224, note (3). (2) 5 E. & B. 944; 25 L. J. (M.C.) 64.

1870
Feb. 2.

THOMAS *v.* THE RHYMNEY RAILWAY COMPANY.

Railway Company—Negligence—Liability of Railway Company to Passenger for Accident caused by Negligence of a Company over whose Line they have Running Powers.

The plaintiff took a ticket of the defendants, a railway company, to be carried as a passenger from A. through B. to C. At B. the defendants' line joins the line of the T. V. Company, over which the defendants have running powers from B. to C. on the payment of certain tolls; the whole of the traffic arrangements over the T. V. line being left by the special Act in the control of the T. V. Company. After leaving B., the train of the defendants in which the plaintiff rode ran into a train of the T. V. company, and the plaintiff was injured by the collision. The defendants' servants were not negligent; and the collision was owing to the negligence of the servants of the T. V. company, in sending on their own train without the proper tail light, and allowing the defendants' train to proceed on the same line of rails too soon after the other train, without giving any warning to the driver of the defendants' train:—

Held, on the authority of *Great Western Ry. Co.* v. *Blake* (7 H. & N. 987; 31 L. J. (Ex.) 346), and *Buxton* v. *North Eastern Ry. Co.* (Law Rep. 3 Q. B. 549), that the defendants were liable for the negligence of the T. V. company.

DECLARATION, that plaintiff became a passenger to be carried with due care on defendants' railway; that defendants so negligently conducted themselves in carrying plaintiff that the train in which plaintiff was came into collision with an engine and van on the railway, whereby plaintiff was injured.

Pleas: Not guilty; and that plaintiff was not a passenger as alleged.

Issue joined.

At the trial before Kelly, C.B., at the Glamorganshire spring assizes, 1869, it appeared that the plaintiff took a ticket of the defendants to be carried as a passenger from Caerphilly to Cardiff. At Llandaff, between those two places, the defendants' line joins the line of the Taff Vale Railway Company, over which the defendants have running powers from Llandaff to Cardiff on the payment of certain tolls; the whole of the traffic arrangements, &c., over the Taff Vale line being left by the special Act in the control of the Taff Vale company alone.

After leaving Llandaff, it being after dark, the train of the defendants in which the plaintiff rode ran into an engine and van of the Taff Vale company which was proceeding in the same direc-

tion on the same line of rails, and the plaintiff was injured by the collision.

In answer to questions by the Lord Chief Baron, the jury acquitted the defendants' servants in charge of the train of all negligence; and found that the collision was owing to the negligence of the servants of the Taff Vale company in sending on their own train without the proper tail light, and allowing the defendants' train to proceed on the same line of rails too soon after the other train, without giving any warning to the driver of the defendants' train that there was another train just ahead of him.

On this finding the verdict was entered for the defendants, with leave to the plaintiff to move to enter the verdict for 450*l.* if the Court should be of opinion that under the circumstances the defendants were liable for the negligence of the Taff Vale company.

A rule was obtained accordingly on the authority of *Great Western Ry. Co.* v. *Blake.* (1)

Field, Q.C., and *H. G. Allen*, shewed cause. *Great Western Ry. Co.* v. *Blake* (1) is distinguishable. There the two companies had an arrangement to share the profits; whereas here the defendants have simply running powers over the Taff Vale line, and have no control whatever over the servants of that company, or over the traffic arrangements. It is true, Byles, J., says he is of opinion that this would make no difference; and Cockburn, C.J., uses expressions wide enough to embrace the present case. But the decision did not go so far, the other judges saying nothing on the point, and Mellor, J., expressly reserves the distinction for future consideration when the point should be raised. The defendants, therefore, are in the position of any other carrier who has no power over the road, and is not liable for any obstruction or alteration in the road causing the accident, unless there be negligence on the part of him or his servants: *Crofts* v. *Waterhouse* (2); *Aston* v. *Heaven.* (3)

[HANNEN, J. In *Grote* v. *Chester and Holyhead Ry. Co.* (4) the

(1) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(2) 8 Bing. 319.
(3) 2 Esp. 533.
(4) 2 Ex. 251.

1870

THOMAS v. RHYMNEY RAILWAY CO.

railway company were held liable for negligence in the erection of a bridge.]

The bridge was on the company's own line.

[LUSH, J. The question is, what is the defendants' contract?

HANNEN, J. The defendants contend, of course, that their contract only extends to due care by themselves and on the part of all over whom they have any control.]

Yes; and that was the exact measure of the liability of a carrier of passengers by railway laid down in the late case of *Readhead* v. *Midland Ry. Co.* (1)

G. B. Hughes, in support of the rule. The defendants, by giving the plaintiff a ticket from Caerphilly to Cardiff, undertook to carry him safely over that journey. They profess to carry over the whole distance as one line of railway. According to the defendants' contention, their contract varies according as the journey is on their own or the other company's line. What a hardship this would impose on the passenger. How is he to know which company to sue?

[LUSH, J. A similar hardship arose in *Quarman* v. *Burnett.* (2)]

That was not a case of contract. The question is in effect concluded by *Great Western Ry. Co.* v. *Blake.* (3) Byles, J., expressly includes the present case, and Cockburn, C.J., puts the liability as consequent on the contract to carry, and says the obligation is the same over the whole journey, whether on the defendants' own line or not. The same point was decided in *Buxton* v. *North Eastern Ry. Co.* (4); and neither Blackburn, J., nor Lush, J., makes any distinction. [He also cited *Birkett* v. *Whitehaven Ry. Co.* (5) and the dictum of Rolfe, B., in *Muschamp* v. *Lancaster, &c. Ry. Co.* (6); and was then stopped by the Court.]

MELLOR, J. I confess my present opinion is that the defendants ought not to be liable, and that a railway company can only be held responsible for the negligence of those over whom they have control. But I think that after the case of *Buxton* v. *North Eastern*

(1) Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.
(2) 6 M. & W. 499.
(3) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(4) Law Rep. 3 Q. B. 549.
(5) 4 H. & N. 730; 28 L. J. (Ex.) 348.
(6) 8 M. & W. at p. 430.

1870

THOMAS v. RHYMNEY RAILWAY CO.

Ry. Co. (1) we cannot decide in favour of the defendants without running counter to that decision. The circumstances under which the one railway company ran over the line of the other, it is true, do not distinctly appear, and no argument was offered on the point; but the distinction was not adverted to; and I think we should not be justified in overruling that case, and the defendants must go to a court of error for that purpose. The circumstances of the present case are distinguishable from *Great Western Ry. Co.* v. *Blake* (2), because there the two companies had mutual arrangements as to sharing the profits, and each company was clearly responsible for the negligence of the other. I did not concur with what my Brother Byles said in that case, and reserved my opinion on the point which has now been expressly raised. But I think the expressions of some of the judges in that case, as well as those of my Brothers Blackburn and Lush in *Buxton* v. *North Eastern Ry. Co.* (1), are wide enough to embrace the present case; and consequently we must leave the defendants to a court of error.

LUSH, J. The distinction now raised between this case and *Great Western Ry. Co.* v. *Blake* (2) was certainly not present to my mind when *Buxton* v. *North Eastern Ry. Co.* (1) was before us, and we acted in that case chiefly on the admission of counsel. It certainly is a very material distinction; but looking at the decision in *Buxton's Case*, and the expressions of the Lord Chief Justice and my Brother Byles in *Blake's Case*, I do not think we ought to act contrary to them; and I can only add that I hope the case may be taken to a court of error, in order that so important a point may be conclusively decided.

HANNEN, J., concurred.

Rule absolute.

Attorneys for plaintiff: *Field & Roscoe.*
Attorney for defendants: *W. G. Ray.*

(1) Law Rep. 3 Q. B. 549. (2) 7 H. & N. 987; 31 L. J. (Ex.) 346.

1870
Jan. 12.

JONES, P. O., *v.* HILL.

Bankruptcy, Plea of—Order of Discharge after Action brought—Plea of Defence after Action—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 161—*Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *s.* 68.

By s. 161 of the Bankruptcy Act, 1861, the order of discharge shall, upon taking effect, discharge the bankrupt from all debts proveable under his bankruptcy; and if thereafter an action shall be brought against him for any such debt, he may plead in general that the cause of action accrued before he became bankrupt, and may give the Act and the special matter in evidence.

The defendant was adjudged bankrupt on the 3rd of September; an action was commenced against him on the 11th of November; and on the 27th of November he obtained his order of discharge, and then pleaded, in the general form, that he became bankrupt before action brought, and that the cause of action accrued before the bankruptcy. Issue having been joined:—

Held, that the plea was not proved: for that it was the order of discharge, and not the adjudication, which was the bar; and that therefore the defence arose after action brought and ought to have been pleaded according to the fact, as required by s. 68 of the Common Law Procedure Act, 1852.

Declaration on a bill of exchange, dated 25th of July, 1868, at three months from date, accepted by the defendant, and indorsed to the bank of which the plaintiff is the public officer.

Plea, in the general form, that before the commencement of this suit the defendant became bankrupt within the meaning of the statute in force concerning bankrupts, and that the cause of action accrued to the plaintiff before the defendant became bankrupt.

Issue joined.

At the trial before Brett, J., at the Liverpool spring assizes, 1869, it appeared that the defendant was adjudged bankrupt on the 3rd of September, 1868. The bill became due on the 28th of October. The writ was issued on the 11th of November, and on the 27th of November the defendant obtained his order of discharge, which was drawn up, issued, and dated on the 28th of December, pursuant to 24 & 25 Vict. c. 134, s. 170. The declaration was delivered on the 2nd of December; plea on the 15th of December, and replication on the 22nd of December, 1868.

The learned judge held that the plea as pleaded was not proved, and gave the defendant leave to amend, but only on payment of all costs, which he declined; and a verdict was directed for the plaintiff, with leave to move to enter the verdict

for the defendant, the Court to be at liberty to amend on such terms as they should think the judge ought to have amended upon.

A rule was obtained accordingly to enter the verdict for the defendant, on the ground that the plea was proved.

R. G. Williams shewed cause. The plea was not proved in the form pleaded, inasmuch as the defendant's order of discharge was not obtained until after action brought. The question is whether, under such circumstances, the general form of plea given in s. 161 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), can be pleaded. (1) It is the order of discharge, and not the bankruptcy, which is the defence, and as the only point of time mentioned is when the order takes effect, "thereafter" must refer to after the taking effect of the order. But this action was commenced before the order was granted. In Bullen and Leake's Precedents, p. 507, 3rd ed., a form of plea is given applicable when the order is obtained after action brought, and it is added, "the general form of plea of the defendant's bankruptcy is given only in actions brought against the bankrupt after he obtained his order of discharge. The order however discharges the bankrupt from all debts and claims proveable under the bankruptcy. If the action is commenced before the order of discharge is obtained, the order, when obtained, may be pleaded as above; or if after plea pleaded, it must be pleaded puis darrein continuance." *Harris* v. *James* (2), will be relied upon in support of the rule; but that case was decided under 5 Geo. 2, c. 30, s. 7, and it is virtually overruled or made inapplicable by subsequent legislation. Thus by 6 Geo. 4, c. 16, s. 126, any bankrupt who shall, after his certificate shall have been allowed, be arrested, or have an action brought against him for a debt proveable under the commission, may plead in

(1) 24 & 25 Vict. c. 134, s. 161: "The order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands, proveable under his bankruptcy . . .; and if thereafter he shall be arrested, or any action shall be brought against him, for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy, and the proceedings precedent to the order of discharge."

(2) 9 East, 82.

1870

JONES v. HILL.

general that the cause of action accrued before his bankruptcy; and 5 & 6 Vict. c. 122, s. 42, and 12 & 13 Vict. c. 106, s. 205, are in precisely similar terms, mutatis mutandis; and it can admit of no doubt that the general form of plea given by these statutes could not apply when the action was commenced before the certificate had been allowed. The same construction must apply to s. 161 of the Act of 1861. "Thereafter" is used instead of saying "after the certificate takes effect," because the two clauses, which are divided by other sections in the former Acts, follow immediately in one section. The defence, therefore, is one arising after action brought, and should have been pleaded according to the fact, as required by s. 68 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). (1) Moreover, the order of discharge, though granted on the 27th of November, was not dated nor issued till the 28th of December, pursuant to s. 170 of the Bankruptcy Act, 1861, and therefore the defendant was not in a position to plead it on the 15th of December. He should have applied to plead it puis darrein continuance; and therefore the judge was right in refusing to amend except on the payment of all costs; and that offer having been then refused, the defendant ought not to be allowed at the present stage to amend on any terms.

Hodgson, in support of the rule. The plea is substantially a plea of bankruptcy, and was therefore proved. In the first place the order of discharge takes effect from the time it is granted, although it is not drawn up nor dated till a month after: this was distinctly decided by Lord Westbury, C., in *Ex parte Bell*. (2)

[COCKBURN, C.J. On this point the Court will undoubtedly follow that decision.]

The order of discharge, therefore, taking effect on the 27th of November, it was incumbent on the defendant to plead his bankruptcy as a defence; for, had he omitted to do so, he could not have availed himself of his order of discharge as a protection: *Rossi* v. *Bailey*. (3) The whole question is really a question of

(1) 15 & 16 Vict. c. 76, s. 68: "Any defence arising after the commencement of any action shall be pleaded according to the fact, without any formal commencement or conclusion; and any plea which does not state whether the defence therein set up arose before or after action, shall be deemed to be a plea of matter arising before action."

(2) 32 L. J. (Bank.) 50.

(3) Law Rep. 3 Q. B. 621.

1870

JONES v. HILL.

costs, and it would be a great hardship on the defendant if he could not plead his bankruptcy in bar in general; for if he was obliged to plead it as a defence arising after action brought, by Rule 23 of Reg. Gen. T. T., 1853, the plaintiff would have been at liberty to confess the plea, and would have been entitled to all costs up to that time; whereas, it was the plaintiff's own fault that any costs were incurred. He began the action after the defendant had become bankrupt, and he had full knowledge that the defendant had obtained his order of discharge and so perfected his defence on the 27th of November, from the advertisement in the "Gazette." And the plaintiff need not therefore have delivered a declaration, as he did, on the 2nd of December. Neither need he have taken issue on the plea; and even if ruled to reply, he might have applied to discontinue, and the costs being in the discretion of the Court, leave would under the circumstances have been given without costs: see Archbold's Practice, 11th ed. 1471, citing 8 Eliz. c. 2, s. 2. The plea was pleaded in the proper form. In Chitty on Contracts, 793, 8th ed., it is laid down: "If the order of discharge were obtained after declaration, but before plea, it would be sufficient to rely upon the general plea given by the statute, without pleading the bankruptcy specially; that is, without setting forth all the proceedings. And it would seem that since 15 & 16 Vict. c. 76, ss. 51, 52, this form of plea will be sufficient, even where both the bankruptcy and the order of discharge are after action brought; but in such case the plea should be pleaded puis darrein continuance." Here the order was before action. In truth, however, it is the bankruptcy completed by the order of discharge, and not the order of discharge, which is the defence; and the defence therefore arose before action brought: *Harris* v. *James*. (1) In *Simpson* v. *Mirabita* (2), the certificate of conformity was held to discharge the defendant not only from the debt but from the costs of the action.

[HANNEN, J. If so, the hardship as to costs seems to vanish: but the question is whether, the order having been obtained after action, the defendant ought not to have pleaded according to the fact, as required by s. 68 of the Common Law Procedure Act, 1852. The plaintiff's hypothesis when commencing the action

(1) 9 East, 82. (2) Law Rep. 4 Q. B. 257.

1870

JONES v. HILL.

may be taken to be that, although the defendant has been adjudged a bankrupt, he may not get his order of discharge. Moreover, if this plea be proved as pleaded under the circumstances of the present case, it would be equally applicable where the adjudication and order were both after action brought.]

No: it is the bankruptcy consummated by the order of discharge which is the defence; and if the bankruptcy were after action it may be conceded that the plea must so state. The form of plea given in s. 161 says nothing about the order, but simply that the cause of action arose before the bankruptcy, which shews that it is the bankruptcy, and not the order, which is the defence. This very point was decided in *Harris* v. *James* (1): that where the bankruptcy was before action and the certificate of conformity allowed after, the certificate proved the plea pleaded in the form given by 5 Geo. 2, c. 30, s. 7, which is in similar terms to the present s. 161,—that the defendant became bankrupt before action, and the cause of action accrued before the defendant became bankrupt. The reasoning of Lord Ellenborough, C.J., upon s. 7 of the then statute, which led him to hold the plea was proved, is just as applicable to the present statute.

COCKBURN, C.J. I am of opinion that this rule must be discharged. If the language of the present statute and of the other statutes preceding it had been the same as that of 5 Geo. 2, c. 30, I should have felt myself bound to follow the decision of Lord Ellenborough in *Harris* v. *James* (1), though I confess it involves reasoning of so subtle a character that I should have felt far from satisfied in so doing. For if the legislature had intended that the mere fact of adjudication should have the effect of putting a stop to all actions against the bankrupt, nothing would have been easier than to have said so in express terms. And looking at the policy of the matter, I cannot help thinking that it would have been well if the legislature had so enacted, and that so long as proceedings in bankruptcy are pending, and so long as it remains probable or possible that the bankrupt will get his discharge, all proceedings in actions against the bankrupt should be suspended; because in all probability money would be thrown away in useless expenses,

(1) 9 East, 82.

and the estate of the bankrupt be lessened. But up to the statute now in question the legislature has not thought fit so to enact. (1) The language of the statute of Geo. 2 was certainly ambiguous, but the language of the intervening statutes is not so; neither does the language of the statute now in question present, to my mind, any ambiguity. For when s. 161 says the order of discharge shall, upon taking effect, discharge the bankrupt from all debts proveable under his bankruptcy, and when it goes on to say that if "thereafter," that is, after the order takes effect, any action shall be brought against him, he may plead in a general form and give the Act and special matter in evidence, it is abundantly clear that it is the order of discharge, and not any of the anterior proceedings, which is to furnish the immunity.

The defence therefore in the present case arose after the commencement of the action, and ought to have been pleaded according to the fact; as s. 68 of the Common Law Procedure Act, 1852, expressly requires. This appears still more clear from the consideration, as my Brother Hannen has suggested, that if Mr. Hodgson's contention be right, the present plea would be equally applicable to the case of an action brought before adjudication, the adjudication being followed by an order of discharge; as well as where the order was obtained before action; and it was to obviate the very doubt which must arise in such cases that s. 68 requires the plea to state whether the defence arose after action brought. For the reasons I have already given I think this was matter of defence arising after action, inasmuch as the adjudication by itself would be no defence, and the order of discharge was obtained after action. The defendant, having refused to amend on the terms offered, must take the consequences; but he may still have leave to amend within a fortnight on payment of all costs; otherwise the rule will be discharged.

MELLOR, J. I am of the same opinion. I should feel myself

(1) By the Bankruptcy Act, 1869, 32 & 33 Vict. c. 71, s. 13, the "Court [of Bankruptcy] may, at any time after the presentation of the petition, restrain further proceedings in any suit, &c., against the debtor in respect of a debt proveable in bankruptcy, or it may allow such proceedings, whether in progress at the commencement of the bankruptcy or commenced during its continuance, to proceed, upon such terms as the Court may think just."

1870

JONES v. HILL.

bound by *Harris* v. *James* (1), did I not think we were relieved from that decision by the effect of subsequent legislation, which all seems to point to a different date, viz., the time when the order or certificate takes effect; that is, to the time when it was granted, and not to any previous date by the artificial doctrine of relation to the commencement of the bankruptcy. Reading s. 161 with the subsequent sections, it is clear that it is the order of discharge, and that alone, which is a bar to further proceedings; and "thereafter" must mean "after the order of discharge takes effect;" there is here no ambiguity, and we are therefore relieved from the effect of the decision under 5 Geo. 2, c. 30, in *Harris* v. *James* (1), and are at liberty to construe the statute of 1861 according to the plain meaning of the words. The order of discharge then affords the defence, and s. 68 of the Common Law Procedure Act, 1852, requires the defence, if of matter arising after the commencement of the action, to be pleaded according to the fact; and any plea which does not state whether the matter of defence arose before or after action shall be deemed to be a plea of matter arising before action; it follows, therefore, that this plea does not meet the true state of facts, and was not proved.

HANNEN, J. Section 68 of the Common Law Procedure Act, 1852, is very explicit and applies to a plea of this kind. It enacts that a defence arising after the commencement of the action shall be pleaded according to the fact, and a plea which does not state whether the defence arose before or after action shall be taken to be a plea of matter arising before action. What, then, is the defence in this case? If the defence be that the defendant became bankrupt simpliciter, then undoubtedly it arose before action; but if bankruptcy simpliciter be not a defence, and the defence depends on the bankrupt obtaining his order of discharge, then, since the order of discharge was not obtained till after action brought, the defence arose after action brought; and since the defendant does not in his plea say that his defence arose after action, the plaintiff had a right to suppose that the defendant meant that the defence arose before action, and so had a right to traverse it and to succeed on the traverse. I do

(1) 9 East, 82.

not think the question can be affected by the consideration of the liability of either party to costs; but if Mr. Hodgson is right, as to which I say nothing, that the order of discharge would operate as a discharge of all costs as well as of the debt, then, if the defendant had pleaded the order of discharge, according to the fact, as a defence after action, and the plaintiff had confessed the plea, the plaintiff would not be able to get his costs. However this may be, I think s. 68 applies to such a plea as the present as well as to others, and the defendant was bound to say that his defence arose after action brought. The rule will be discharged: but the defendant is to be at liberty to amend within a fortnight on payment of all costs.

Rule accordingly. (1)

Attorneys for plaintiff: *Duncan, Squarey, & Co., Liverpool.*
Attorney for defendant: *Stackpoole.*

THE QUEEN *v.* PEARSON.

Feb. 15.

Justices—Jurisdiction—Summary Conviction on Charge of Assault—Jurisdiction ousted by Question as to Title to Land—Excess of Force in Assertion of Right—24 & 25 Vict. c. 100, *ss.* 42, 46.

On the hearing of a complaint for an assault, under 24 & 25 Vict. c. 100, s. 42, if it be shewn that a bonâ fide question as to title to land is involved, the jurisdiction of the justices is at once ousted by s. 46, which provides that nothing in the Act shall authorize justices to hear and determine any case of assault in which any question shall arise as to the title to any lands, &c.; and the justices cannot proceed to inquire into and determine by summary conviction any excess of force alleged to have been used in the assertion of title.

RULE, calling upon Robert Turner, and two Justices of the county of Derby, to shew cause why a conviction by the justices of John Pearson for an assault on Turner should not be quashed.

The conviction had been brought up by certiorari, and it appeared

(1) See now 32 & 33 Vict. c. 71, s. 49 . . . "An order of discharge shall be sufficient evidence of the bankruptcy, and of the validity of the proceedings thereon; and in any proceedings that may be instituted against a bankrupt who has obtained an order of discharge in respect of any debt from which he is released by such order, the bankrupt may plead that the cause of action occurred before his discharge, and may give this Act and the special matter in evidence."

1870

THE QUEEN v. PEARSON.

from the affidavits that, the defendant having appeared before the justices on a summons, under 24 & 25 Vict. c. 100, s. 42 (1), charging him with having assaulted Turner, it was proved that Turner had placed some bricks on an open piece of land of which the defendant claimed to be the owner, and that the defendant was removing the bricks, as being unlawfully on his land, when Turner came up, and the alleged assault was committed.

It was submitted on behalf of the defendant that as a question of title to land arose the justices had no jurisdiction to determine the case, by reason of the second proviso in s. 46, "that nothing in the Act contained shall authorize any justices to hear and determine any case of assault or battery in which any question shall arise as to the title to any lands, tenements, or hereditaments. . . ."

It was not denied by Turner that the defendant was raising a bonâ fide claim to the land, but it was contended on behalf of Turner that the justices ought to proceed with the hearing of the charge, and that they had authority to determine it, notwithstanding the proviso in s. 46, if the defendant used more force than was necessary.

The justices took this view, and convicted the defendant of an assault in a penalty of 2*l.* 10*s.* and costs.

Robinson, Serjt., shewed cause on behalf of the justices, and contended that as a claim of title to land would not justify any excess of violence in the assertion of such right, the justices were not, by s. 46, ousted of their jurisdiction to determine the question of whether or not there had been an excess of violence; and he referred to a passage in 1 Oke's Magisterial Synopsis, p. 233, 10th ed. note 36, where *Reg.* v. *Richards* (2) is cited, on which passage and case it was understood that the justices had acted. [He also cited *Re Thompson.* (3)]

G. Bruce, in support of the rule, was not heard.

LUSH, J. The rule must be made absolute. This is a very clear case. It stands uncontradicted that the assault was committed in the assertion of title. The prosecutor had entered on

(1) 24 & 25 Vict. c. 100, s. 42: "Where any person shall unlawfully assault any other person, two justices of the peace, upon complaint by or on behalf of the party aggrieved, may hear and determine such offence," &c.

(2) 20 J. P. 68.

(3) 6 H.& N. 193; 30 L. J. (M.C.) 19.

1870

THE QUEEN v. PEARSON.

land to which the defendant claimed title, and had put bricks there; and it was in the act of asserting this title by removing the bricks that the alleged assault was committed. This question of title was, it appears, most distinctly brought to the notice of the justices, and their jurisdiction was then at an end by reason of the second proviso in s. 46, and they had no power to go into the question whether the force used by the defendant was excessive. The words of the proviso are very large, and admit of no doubt. By s. 42, where a person has unlawfully assaulted another, the justices have jurisdiction to hear and determine the offence on complaint of the party aggrieved; and the proviso in s. 46, in the widest terms, says that "they shall not hear and determine any case of assault in which any question shall arise as to the title to land;" that is, they shall not dispose of such a case in a summary manner. The matter may still be disposed of by indictment, if it be a proper case for such a proceeding. The justices ought, therefore, to have held their hand, and not proceeded to adjudicate by summary conviction.

HANNEN, J., concurred.

Rule absolute.

Attorneys for justices: *Aldridge & Thorn.*

Attorneys for defendant: *Neal & Philpot, for Wilson & Burkinshaw, Alfreton.*

MARSHALL *v.* MARTIN.

Jan. 28.

Costs—Action of Slander—Verdict under 40*s.*—21 *Jac.* 1, *c.* 16, *s.* 6—*Effect of Certificate of Judge under* 3 *&* 4 *Vict. c.* 24, *s.* 2, *and* 30 *&* 31 *Vict. c.* 142, *s.* 5.

In an action of slander imputing felony to the plaintiff, the jury gave a verdict for 1*s.*, and the judge certified, under 3 & 4 Vict. c. 24, s. 2, that the slander was wilful and malicious, and under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in the superior court:—

Held, that the plaintiff was not entitled to costs: for that by 21 Jac. 1, c. 16, s. 6, which was unrepealed, the plaintiff, having obtained a verdict for less than 40*s.*, was only entitled to as much costs as damages; and the subsequent statutes were in the negative, and therefore only enabled the judge or court to certify for or allow such costs as the plaintiff was entitled to before the statutes passed.

ACTION for slander, imputing felony to the plaintiff.

At the trial the jury gave a verdict for 1*s.*, and the learned judge certified under 3 & 4 Vict. c. 24, s. 2, that the slander was wilful

1870

MARSHALL v. MARTIN.

and malicious, and under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in the superior court. The master accordingly taxed the plaintiff his costs.

A rule was then obtained to set aside this allowance of costs, on the ground that by 21 Jac. 1, c. 16, s. 6, the plaintiff could have and recover only so much costs as damages; *Evans* v. *Rees* (1) being cited to shew that the statute of James was still in force.

H. Matthews, Q.C., shewed cause, and contended that the effect of the 30 & 31 Vict. c. 142, s. 5, was to repeal the statute of James, and that the judge's certificate therefore entitled the plaintiff to full costs. He also contended, that even if the statute of James were not repealed, as the latter part of s. 5 enabled the Court to allow the plaintiff his costs, this must mean full costs.

Heywood, in support of the rule, was not heard.

THE COURT (Cockburn, C.J., Mellor and Lush, JJ.) were clearly of opinion that the plaintiff was not entitled to costs. *Evans* v. *Rees* (1) was directly in point. The statute of James was still in force, and the certificates under the later statutes only remitted the plaintiff to the position he was in before the statutes passed. The 30 & 31 Vict. c. 142, s. 5, was entirely in the negative, and was a disabling enactment, and the latter part of the section was no larger than the former part, and enabled the Court to allow by rule only such costs as the certificate of the judge would entitle the plaintiff to.

Rule absolute.

Attorney for plaintiff: *A. B. Carpenter, for Spilsbury, Stafford.*
Attorney for defendant: *W. Thistlethwaite.*

(1) 9 C. B. (N.S.) 391; 30 L. J. (C.P.) 16.

BECHER *v.* THE GREAT EASTERN RAILWAY COMPANY.

1870
Feb. 11.

Railway Company—Carriers—Passenger's Luggage.

The plaintiff gave his portmanteau to his servant to take with him by the defendants' railway from N. to L., he intending himself to travel by a later train. The servant took, and paid the defendants for, a ticket from N. to L., and delivered to the defendants the plaintiff's portmanteau and his own luggage as his (the servant's) ordinary luggage, each passenger being entitled to take with him his ordinary luggage, not exceeding a certain weight, free of charge; and the defendants received the portmanteau as such ordinary luggage. The plaintiff travelled as a passenger from N. to L. by a later train on the defendants' line, without any luggage. The portmanteau having been lost during the journey by the defendants' default:—

Held, that the plaintiff could not maintain an action against the defendants for the loss.

CASE stated without pleadings.

The action is brought by the plaintiff against the defendants for the recovery of 56*l.* 16*s.* 6*d.*, the value of wearing apparel, and a portmanteau in which it was contained belonging to the plaintiff.

The defendants are a railway company incorporated by 25 & 26 Vict. c. ccxxiii., and are common carriers for hire by railway of goods and passengers from Newmarket to London.

In July, 1868, the plaintiff and some friends arranged to go from London to Newmarket, for the purpose of attending the races there, and they took a man-servant of one of the party to attend on them in common during their stay at Newmarket.

On the last day of the races, the servant being about to return by an early train on the defendants' line, and the plaintiff being desirous of returning later in the day, the plaintiff entrusted his portmanteau and its contents to the servant, with directions to take it up to London with him. The plaintiff gave the servant 1*l.* for his attention during his stay at Newmarket.

The servant accordingly proceeded to the defendants' station at Newmarket, and obtained from the defendants and duly paid them for a ticket from Newmarket to London. The servant delivered over the portmanteau with its contents and his own luggage, as well as that of the other gentlemen, to the servants of the defendants at the Newmarket station, as his ordinary luggage, and the same was received by the defendants as ordinary luggage,

1870

BECHER v. GREAT EASTERN RAILWAY CO.

for the purpose of being carried by the defendants, as carriers as aforesaid, with the servant on his journey. The servant was carried by the defendants to London, but the portmanteau and its contents were lost during the journey by default of the defendants.

The plaintiff himself proceeded from Newmarket to London by a later train on the defendants' railway on the same day, and he also duly obtained and paid the defendants for his ticket for such journey, and took no luggage with him.

By s. 228 of the Great Eastern Railway Act, 1862 (25 & 26 Vict. c. ccxxiii.), every passenger travelling upon the railways may take with him his ordinary luggage, not exceeding 120 lbs. in weight for first class passengers, 100 lbs. in weight for second class passengers, and 60 lbs. in weight for third class passengers, without any charge being made for the carriage thereof.

The luggage taken with the servant on the journey was delivered to the company as not exceeding the weight he was allowed to take as luggage under the above section, and was not weighed by the company.

The Court was to be at liberty to draw from the above facts any conclusions or inferences which, in their judgment, ought to be drawn.

The question for the Court was, whether the defendants are liable to the plaintiff for the loss of the portmanteau and contents.

Philbrick, for the plaintiff. The question is, whether an action in any form can be maintained by the plaintiff against the defendants. The defendants are found to be common carriers, and the portmanteau was lost by their default, and by the custom of the realm they are liable. It is true that the portmanteau was delivered to them by the servant, but in the analogous case of an innkeeper, it is laid down in Com. Dig. tit. "Action on the Case for Negligence," B. (B 1), "The master may have an action for goods lost at an inn, where his servant was a guest;" and the cases cited fully bear out the proposition. There is a duty imposed upon the defendants as carriers, independent of contract.

[LUSH, J. To do what? What have the defendants to do with the plaintiff? For this purpose he is an entire stranger.]

The goods were his.

1870

BECHER v. GREAT EASTERN RAILWAY CO.

[LUSH, J. But the company accepted and carried them as passenger's luggage belonging to the servant.]

If the Court think that no action will lie independent of contract, no doubt there is difficulty; as in *Alton* v. *Midland Ry. Co.* (1), it was held that a master could not maintain an action for the loss of his servant's services through injury caused on the defendants' line, inasmuch as the contract of carriage by the defendants was with the servant.

Marriott, for the defendants, was not heard.

MELLOR, J. I have no doubt that no action will lie at the suit of the present plaintiff. It is clear the defendants received the portmanteau as luggage of the servant. The servant takes the ticket, and says nothing, but simply as any other passenger delivers the portmanteau with other things as his luggage, and the company's servants receive it as his luggage, to be carried as passenger's luggage. If the servant had stated when he took the ticket that the luggage belonged to the plaintiff, and that the plaintiff was coming by a later train, and the defendants' servants had received the portmanteau as the master's luggage, the case would have been very different. Here there is nothing to impose any duty or liability on the defendants beyond the relation between them and the servant of carrier and passenger, they undertaking to carry his luggage free of extra charge.

LUSH, J. What was the position of the parties here? The defendants were bound by their statute to take a certain quantity of luggage for the servant as their passenger; but if they had been informed that the portmanteau was not his luggage, they would not have been bound to take it, and in all probability they would not have taken it. It was taken as the servant's own luggage, and if any action can be maintained, it must be in the name of the servant.

HANNEN, J., concurred.

Judgment for the defendants.

Attorney for plaintiff: *Cavell.*

Attorney for defendants: *W. H. Shaw.*

(1) 19 C. B. (N. S.) 213; 34 L. J. (C.P.) 292.

1870
Jan. 21.

THE NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCIATION *v.* ARMSTRONG AND OTHERS.

Marine Insurance—Valued Policy—Value where conclusive—Right of Underwriters, paying on Total Loss, to be subrogated for Insured.

A policy of insurance was effected for 6000*l.* on the ship *H.*, valued at 6000*l.* The *H.* was run down and sunk by another ship, and the underwriters paid the owners the 6000*l.* as for a total loss. Afterwards 5000*l.* was recovered in the Court of Admiralty in respect of the *H.* against the owners of the other ship. The real value of the *H.* was 9000*l.*; and there was no other insurance upon her:—

Held, that, as between the underwriters and the assured, the value of the *H.* must be taken to be 6000*l.* for all purposes; and that therefore the damages recovered, which were in the nature of salvage, belonged entirely to the underwriters.

CASE stated by consent without pleadings.

This is an action brought for the recovery of 4948*l.* 18*s.*

The defendants, by a policy of insurance, caused themselves to be insured, lost or not lost, from the 20th of February, 1866, until the 20th of February, 1867, upon the body, machinery, tackle, apparel, boats, and other furniture of, and in the steamship called the *Hetton*, of which they were owners, against the usual perils, including damage done to the ship; with the usual suing and labouring clause. And it was stipulated that the ship, machinery, tackle, &c., for so much as concerned the defendants by agreement between them and the insurers, the plaintiffs, should be valued at 6000*l.*

The plaintiffs subscribed the policy for 6000*l.*

That was the only insurance effected on the *Hetton*.

In December, 1866, the *Hetton* was run down and sunk by a steamship, the *Uhlenhorst*, and was thereby, being one of the perils insured against, totally lost. The plaintiffs thereupon, under the policy, paid to the defendants 6000*l.* for such loss.

Proceedings were afterwards instituted, under instructions from the plaintiffs, in the Court of Admiralty, in the names of the defendants, against the owners of the *Uhlenhorst*, for the recovery of damages and compensation for the loss of the *Hetton* and her cargo, and the injuries to her master and crew, occasioned by the running down; and eventually on appeal, the Privy

Council gave judgment against the owners of the *Uhlenhorst* for 5683*l.* 11*s.* 7*d.* (1)

Pending the proceedings in the Court of Admiralty, notice was given to the plaintiffs by the defendants claiming whatever might be recovered against the *Uhlenhorst*, and ultimately an agreement was come to that any sum recovered should be paid into a bank to abide the decision of this Court.

The 5683*l.* 11*s.* 7*d.* was paid by the owners of the *Uhlenhorst*, and 5495*l.* 18*s.*, part thereof, was accordingly deposited pursuant to the agreement, in the London and Westminster Bank, pending the decision of this Court. The residue of the 5683*l.* 11*s.* 7*d.*, namely, 187*l.* 13*s.* 6*d.*, has been paid to the master and crew of the *Hetton* who were entitled to it. A portion of the 5495*l.* 18*s.* is payable to the owners of freight and of the cargo on board the *Hetton* at the time of the loss. The residue is payable for the loss of the *Hetton* and its machinery, tackle, &c.

The plaintiffs claim the whole of the 5495*l.* 18*s.*, after deducting the amount payable to the owners of the cargo and freight. On the other hand the defendants allege that the value of the *Hetton* at the time she was lost was 9000*l.*, and notwithstanding its value is declared in the policy to be 6000*l.*, and that sum has been paid by the plaintiffs as above stated, the defendants claim to be entitled to participate in the sum of 5495*l.* 18*s.*, after the above deduction.

The question for the opinion of the Court was, whether or not the plaintiffs (assuming the *Hetton* at the time of the loss to have been of the value of 9000*l.*) are entitled to have payment made to them of the whole, or if not of the whole, of any and what part of the 5495 18*s.*, after deducting the amount payable to the owners of the cargo and freight.

Sir G. Honyman, Q.C. (with him *Udall*), for the plaintiffs. The plaintiffs, the underwriters, having paid for a total loss, are entitled to the whole of the damages recovered against the vessel which caused the loss. Nothing is better established in insurance law

(1) This appears from the statement of counsel, see post, p. 248, to have been the limit of the *Uhlenhorst's* liability, under s. 54 of the Merchant Shipping Act, 1862, 25 & 26 Vict. c. 63.

1870

NORTH OF ENGLAND INSURANCE ASSOCIATION v. ARMSTRONG.

than that, whether upon abandonment or upon an actual total loss, the underwriters, having paid for a total loss, are subrogated for the assured, and have all their rights. Thus, in *Randal* v. *Cockran* (1), the underwriters, having paid for goods taken by the enemy, were held entitled to the owner's share in prizes under letters of reprisal. In *Mason* v. *Sainsbury* (2) the insurers, having paid for a house destroyed by rioters, was held entitled to sue the hundred in the assured's name; the same principle was recognized in *Yates* v. *Whyte*. (3) In *Stewart* v. *Greenock Ins. Co.* (4) all the remains of the ship insured with all the incidents were held to vest in the underwriter on a claim and payment of a total loss. The insurers' right to be subrogated for the assured was assumed in *Quebec Ass. Co.* v. *St. Louis* (5); and in the late case of *Dickenson* v. *Jardine* (6) the former cases were recognized, and the same principle acted upon as to general average contribution. See also 2 Phillips Ins. § 1183, 2 Arnould Ins. 3rd ed. p. 1002–1004, and *Houstman* v. *Thornton*. (7) Where the underwriter has paid for a total loss he is entitled to all salvage, unless he entered into a compromise: *Brooks* v. *Macdonnell*. (8) See the matter discussed at length in 2 Arnould Ins., 3rd ed. p. 866; and 2 Phillips Ins. §§ 1707, 1711, 1712, and 1723. The contract of insurance is a contract of indemnity only, based on the value of the thing insured; and on a valued policy the value agreed is conclusive between the parties for all purposes where the insurer has paid the full value as for a total loss: *Irving* v. *Manning*. (9) *Bousfield* v. *Barnes* (10) is the only case to the contrary; but there, there were two valued policies, the value declared being different in the two. But that case was doubted in *Irving* v. *Richardson* (11), and Lord Tenterden was of opinion that, if there are two valued policies with the same value in each, the assured can on the whole only recover the declared value; and in *Bruce* v. *Jones* (12) it was held that the insured was only entitled to claim against the underwriter indemnity to the amount

(1) 1 Ves. Sen. 98.
(2) 3 Doug. 61.
(3) 4 Bing. N. C. 272, 283.
(4) 2 H. L. C. 159.
(5) 7 Moo. P. C. 286, 316.
(6) Law Rep. 3 C. P. 639, 643.
(7) Holt, N. P. 242.
(8) 1 Y. & C. 500.
(9) 1 H. L. C. 287.
(10) 4 Camp. 228.
(11) 1 Moo. & Rob. 153.
(12) 1 H. & C. 769; 32 L. J. (Ex.) 132.

1870

NORTH OF ENGLAND INSURANCE ASSOCIATION v. ARMSTRONG.

stated in a valued policy, and that having recovered already on other policies, he could only claim the difference between what he had already received and the amount in the valued policy. The owners are in effect estopped from saying that 6000*l.* is not a complete indemnity to them, and whatever is afterwards recovered is in the nature of salvage, and belongs to the underwriters.

A. L. Smith (with him *Watkin Williams*), for the defendants. The agreed valuation is only conclusive in an action on the policy; the insured are entitled to so much of the damages recovered against the other ship as will give them complete indemnity on the true value of their ship, viz., 9000*l.* The damages are not in the nature of salvage, but are more like the recovery on a second insurance. The ship being worth 9000*l.*, suppose there had been besides this valued policy another open policy to the amount of 3000*l.*, so as to cover the whole value. The assured having recovered against the present plaintiffs, could also recover 3000*l.* on the open policy, on proof that the lost ship was worth 9000*l.* But if the plaintiffs are right in their present contention, they would also be entitled to claim the 3000*l.* recovered on the open policy; but such an action was never heard of. If the assured be estopped by the valuation on a valued policy for all purposes, he cannot afterwards effect a fresh insurance however much the value of the thing insured may have afterwards increased.

[LUSH, J. He may make a fresh insurance for the whole value.]

And thereby pay double premium. None of the cases cited are conclusive of the present case. In *Randal* v. *Cockran* (1) the ground of the decision was that satisfaction had been made to the owner. So, again, in *Yates* v. *Whyte* (2), the Court clearly point out that not until the assured has been entirely indemnified is the insurer subrogated for him.

[LUSH, J. Suppose the ship had been raised and repaired by the wrongdoer, whose ship would she be?]

The underwriters': but then that would be a case of salvage, which this is not. The question is, whether the insurer is subrogated for the insured, unless the latter has been actually indemnified according to the real value. *Bousfield* v. *Barnes* (3) shews that the valuation in a valued policy is no estoppel except in an

(1) 1 Ves. Sen. 98. (2) 4 Bing. N. C. 272. (3) 4 Camp. 228.

1870

NORTH OF ENGLAND INSURANCE ASSOCIATION v. ARMSTRONG.

action on the policy. If it were an estoppel, then if the liability of the owners of the *Uhlenhorst* had not been limited by the Merchant Shipping Act, 1862, and they had had to pay the full value of 9000*l.*, the underwriters would have been entitled to the whole. (1)

[COCKBURN, C.J. Suppose the assured had recovered the damages before the insurers had paid them the 6000*l.*, could they have recovered the whole 6000*l.*, or only the difference between 6000*l.* and the amount of damages?]

Only the difference: but then that would have been because the value in the policy estops them in an action on the policy. The same thing would have arisen if there had been an open policy and a valued one, and the assured had recovered on the open policy first. [He also referred to 2 Arnould Ins. 3rd ed. p. 868; Addison on Torts, p. 910, 2nd ed.; and *Stringer* v. *English Ins. Co.* (2)]

Sir G. Honyman, Q.C., was not heard in reply.

Jeff Cas 334

COCKBURN, C.J. We are satisfied that our judgment must be in favour of the plaintiffs; and I ground my judgment upon the general proposition, that where the value of a thing insured is stated in the policy in a manner to be conclusive between the two parties, the insurer and the insured, as regards the value, then, in respect of all rights and obligations which arise upon the policy of insurance, the parties are estopped between one another from disputing the value of the thing insured as stated in the policy.

Now, I take it to be clearly established, in the case of a total loss, that whatever remains of the vessel in the shape of salvage, or whatever rights accrue to the owner of the thing insured and lost, they pass to the underwriter the moment he is called upon to satisfy the exigency of the policy, and he does satisfy it. It is admitted that if this ship had been recovered from the bottom of the sea by any of the contrivances of modern skill and science available for that purpose, the body of the vessel would have passed to the underwriters. If, moreover, her value had proved to be more than the estimated value in the policy, the underwriters would still have been entitled to the vessel so recovered. And I think it is clear also, where we have, instead of the ship, the supposed value of the ship, or so much of it as the delinquent vessel could be

(1) See ante, p. 245, n. (1). (2) Law Rep. 4 Q B. 676.

1870

NORTH OF ENGLAND INSURANCE ASSOCIATION v. ARMSTRONG.

called upon to contribute for the loss, that what is recovered must be taken to represent the lost ship; and, then, just as the underwriters would be entitled to the ship if it could have been bodily got back, so they are entitled to that which is the representative of the ship in the shape of damages to be paid by the owners of the vessel which caused the collision. It seems to me, further, altogether monstrous to say, that where there is a valued policy and an open policy, it is to depend upon the question of which party is first sued, whether the underwriters on the valued policy shall be bound or not to pay the assured the full value in the policy. It is conceded by Mr. Smith that, if there were this valued policy and an open policy, and the assured were first to sue upon his open policy, and recovered 3000*l.*, he would not be afterwards entitled to recover on the valued policy the whole amount in that policy, but only 3000*l.*, the difference between the amount recovered on the open policy and the amount of the estimated value in the valued policy. So, again, it must be conceded that if this sum, by way of damages, had been recovered first from the owners of the vessel which caused the damage, the underwriters upon this valued policy could not have been compelled to pay to the assured the whole of the sum insured, because the value of the vessel as between them must always be taken to be the amount at which it is stated in the policy. Therefore, though it certainly startles one a little that the underwriters, who have only paid 6000*l.*, the estimated value as stated in the policy and agreed upon between the parties, shall, if the vessel should prove to be equal to that 6000*l.*, or worth more, get all that can be recovered in respect of the loss of the vessel, yet still, I think that is an incident which arises from this novel form of policy, in which the value of the vessel is taken at a fixed sum as agreed upon between the parties. If parties will enter into such policies, they must take the consequences; and I do not think we can bend the old rules which exist in respect of marine policies, and wrest them from that which was their original position for the purpose of adapting them to these new-fangled forms of insurance. It has always been considered as a settled rule in insurance law, as I started with observing, that where there is a total loss the underwriters, who pay upon a total loss, whether it is actual or whether it is constructive, are entitled to anything that

1870

NORTH OF ENGLAND INSURANCE ASSOCIATION v. ARMSTRONG.

remains of the vessel, and to anything which would otherwise have accrued to the owner of the vessel by reason of his ownership. Where the policy is an open policy, and simply a policy of indemnity as to the actual value of the vessel, no difficulty would arise in such a case as this. It is only because it is a valued policy that these difficulties present themselves. I think we must still apply the old rules, and not make new; and if a party chooses to have his vessel or his goods, as the case may be, taken at a fixed value, instead of leaving the contract, as in an ordinary policy, simply one of indemnity to the extent of the real value, and if thereby any benefit accrues to the underwriters, the underwriters must be entitled to it. I think, therefore, our judgment must be for the plaintiffs.

MELLOR, J. I am of the same opinion. I think Mr. Smith fairly states the question which determines the matter, viz., what is the effect of the agreement as to the value? The basis of the contract is the agreed value of the vessel, and when, to avoid all questions as to the real value, the parties come to an agreement as to the value, it appears to me to follow as a matter of course that all those rights, which spring out of the payment by an underwriter for a total loss, must be governed by the agreed value.

LUSH, J. I am of the same opinion. A person effecting an insurance may either agree upon the amount which is to be considered as the sum forming a complete indemnity, or he may leave it open. If he fixes the amount which he is to be paid in the case of a total loss, and the underwriter accepts that amount, then that amount must be binding upon both parties. If each of the parties agrees that a certain sum shall be deemed to be the value of the thing insured, the underwriter, in the case of a total loss, is not to be at liberty to say the thing is not worth so much; he is bound to pay the amount fixed upon, whether it is the proper amount or not. And, on the other hand, the assured is not at liberty to say it is worth more; he is bound by that amount. It is for the purpose of avoiding all question about the value that the parties agree to fix that amount, and for all purposes, therefore, of adjusting the rights under that policy both the parties are bound by that value. Mr. Smith admits that the underwriters, having paid the

full amount agreed on in the policy as the value of the thing insured, would be entitled to the wreck if they could get it. If the underwriters had got the wreck up, and if they had procured the wrongdoer to repair the vessel, the vessel so repaired would still belong to the underwriters. What difference can it make whether the wrongdoer repairs the thing in specie, or pays in money the amount it would take to repair? In either case, whatever is recovered belongs to the underwriters by reason of their having paid that which both parties agreed should be deemed to be the full value of the property insured. It follows, therefore, that the underwriters are entitled to our judgment.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Williamson, Hill, & Co.*
Attorneys for defendants: *Shum & Crossman.*

THE QUEEN *v.* THE MAYOR AND ASSESSORS OF MONMOUTH.
THE QUEEN *v.* THE MAYOR AND ASSESSORS OF BOLTON.

Jan. 27.

*Municipal Corporation—Burgess List—Notice of Objection—Description of Person objected to—Description of Objector—*5 & 6 *Wm.* 4, *c.* 76, *s.* 17, *Sch. D.* 3 *—Mandamus—Declining of Jurisdiction by Inferior Tribunal.*

A notice of objection, under 5 & 6 Wm. 4, c. 76, s. 17, and Sch. D. 3, to a person on the burgess list of a borough, need not specify the parish in which the objector's qualifying property is situate; nor the nature of the property in respect of which the person objected to is rated.

The mayor and assessors of a borough, at a court for the revision of the burgess list, holden between the 1st and 15th of October, the time limited by s. 18, erroneously determined that certain notices of objection were invalid, and refused to inquire into the qualifications of the persons objected to:—

Held, that the mayor and assessors had declined jurisdiction; and the Court granted a mandamus commanding them to hold a court to revise the list, although the time limited had elapsed.

THE QUEEN *v.* THE MAYOR OF MONMOUTH.

RULE, calling upon the Mayor and Assessors of the Borough of Monmouth to shew cause why a writ of mandamus should not issue, commanding them to hold a court and hear the objections of Henry Evans to certain persons, as not being entitled to have their names retained on the burgess list of the borough, and proceed to revise such lists accordingly.

1870

THE QUEEN v. MAYOR OF MONMOUTH.

It appeared from the affidavits, that at a court held on the 5th of October, 1869, pursuant to s. 18 of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76), for revising the burgess list of the borough of Monmouth, Henry Evans objected to James Beach (and twenty-one other persons), as not being entitled to have his name retained on the burgess list for the ensuing year. (1)

The notices of objection, which had been duly served, pursuant to s. 17 of 5 & 6 Wm. 4, c. 76 (1), on the town clerk and James Beach, were signed "Henry Evans, of Glendower Street, in the borough of Monmouth, on the burgess list of the said borough, for a house described to be situate in Almshouse Street, in the said borough."

The borough of Monmouth consists of the parish of Monmouth and part of the parish of Dixton. The property for which Henry Evans was rated was described in the burgess list as situate in Almshouse Street.

It was objected on behalf of James Beach that the notice of objection was invalid: 1st, because it did not state that Henry Evans, the objector, was rated; 2nd, because it did not state the parish in which the property for which he was rated was situate.

The other notices of objection were in the same form.

The mayor and assessors held the notices of objection to be bad,

(1) 5 & 6 Wm. 4, c. 76, s. 17:—"Every person whose name shall have been inserted in any burgess list for any borough, may object to any other person as not being entitled to have his name retained in the burgess list for the same borough; and every person so objecting shall . . . give to the town clerk of such borough and also give to the person objected to . . . notice thereof in writing according to the form No. 3 in sch. D. or to the like effect . . ."

Sch. D. No. 3.—NOTICE OF OBJECTION.

To the town clerk of the borough of

[*or to the person objected to as the case may be*]

I hereby give you notice that I object to the name of Thomas Bates, of Brook's Farm in the parish of [*describe the person objected to as described in the burgess list*] being retained on the burgess list of the borough of .

Dated day of , in the year .

(Signed) JOHN ASHTON, of

[*Here state the place of abode, and property for which he is said to be rated in the burgess list.*]

s. 18:—"The mayor and assessors . . . shall hold an open court within the borough for the purpose of revising the burgess lists at some time between the 1st day of October, inclusive, and the 15th day of October, inclusive, in every year . . ."

s. 19:—"The mayor shall have power to adjourn the court from time to time, so that no such adjourned court shall be held after the 15th day of October in any year . . ."

and retained the names of James Beach, and of the other persons objected to, upon the burgess list.

Macnamara shewed cause. It must be admitted that the mayor and assessors were wrong, and that the notice of objection was good. But they have heard the objection and decided it; their decision is final, and cannot be reviewed by this Court. It is quite clear that before the passing of 7 Wm. 4 & 1 Vict. c. 78, a person whose claim had been rejected or name expunged at the revision of the burgess list, was not entitled to a mandamus: *In re Mayor of Hythe* (1), *Reg.* v. *Mayor of Harwich.* (2) The same difficulties would exist against granting a mandamus in the case of a person whose name is retained on the list. By s. 24 of 7 Wm. 4 & 1 Vict. c. 78, this Court is empowered to issue a mandamus where a name has been rejected or expunged, but not where a name has been retained. It would seem, therefore, that the legislature intended to give a remedy by mandamus only where a person had been disfranchised. Under ss. 18 and 19 of 5 & 6 Wm. 4, c. 76, the mayor and assessors cannot hold a court for the revision of the lists after the 15th of October. This Court, therefore, have no power now to grant a mandamus. In *Mayor of Rochester* v. *Reg.* (3), a mandamus issued commanding the mayor and assessors to hold a court and hear objections; but that was under peculiar circumstances. The mayor and assessors there refused to revise the burgess list, because they held it had not been duly published; and the Court granted the mandamus on the ground that unless the list was revised a large section of the city of Rochester would be disfranchised. But here the mayor and assessors have held a court and decided upon the objections.

Manisty, Q.C., and *Watkin Williams*, in support of the rule, were not heard.

THE COURT intimated, that before giving judgment, they would hear

THE QUEEN *v.* THE MAYOR OF BOLTON.

This was a similar rule, calling upon the Mayor and Assessors of Bolton, to shew cause why a writ of mandamus should not issue, com-

(1) 5 A. & E. 832.
(2) 8 A. & E. 919.
(3) E. B. & E. 1024; 27 L. J. (Q.B.) 431.

1870

THE QUEEN v. MAYOR OF BOLTON.

manding them to hold a court and hear the objections of William Ellison to certain persons, as not being entitled to have their names retained on the lists of the burgess of the borough, and proceed to revise such lists accordingly.

It appeared from the affidavits, that at a court held on the 4th of October, 1869, for the purpose of revising the burgess lists for the borough of Bolton, William Ellison objected to the names of Robert Gooden and William Simmons (amongst others) being retained on the list of burgesses.

Robert Gooden's name appeared on the burgess list as rated for a "warehouse," situate in "Bridge Street." The notice of objection served on the town clerk stated "I object to the name of 'Robert Gooden, Bridge Street;'" and it was contended that the omission of the nature of the property for which Gooden was rated rendered the notice invalid, as it did not comply with the requirements of s. 17 and sch. D. No. 3.

The notice of objection to William Simmons delivered to the town clerk, stated, "I object to the name of 'William Simmons, house, 10, Rock Street,'" which was the entry given in the burgess list; but in the notice given to Simmons himself the word "house" was omitted.

The mayor and assessors held that the notice, as to Robert Gooden, given to the town clerk, and the notice given to William Simmons, were invalid, on the ground that they did not describe the persons objected to as they were described in the burgess list.

A large proportion of names in the burgess list had been similarly objected to by Ellison, but were retained on the list by the mayor and assessors, on the ground that the notices of objection were invalid.

Holker, Q.C., and *John Edwards*, shewed cause. The mayor and assessors were right in holding the notices invalid. Sch. D. No. 3, requires the objector to describe the person objected to as described in the burgess list. The description in these notices are not the same as those in the burgess lists, and they are therefore invalid. Section 17 requires the town clerk to make out a list of the persons objected to in the form given in sch. D. No. 5, and in that list the nature of the property for which the person objected

1870

THE QUEEN v. MAYOR OF BOLTON.

to is rated must be specified. As the town clerk is to make out the list from the notices, it is clear that, if the nature of the property is omitted from the notices, he has not the materials wherewith to make out the list. Moreover, it is entirely a question for the mayor and assessors. They have entertained the question, and decided it. The Court, therefore, will not review their decision. There has been no refusal to hear, and therefore no declining of jurisdiction. In *Reg.* v. *Freemen of Leicester* (1), where the deputies decided that a notice of objection had not been served, and therefore refused to inquire further into the election of a freeman, the Court refused to grant a mandamus, on the ground that it was a question of fact whether the notice was given or not, and that, as the deputies had decided that fact, the Court could not review their decision. Secondly, the revision of the lists having been concluded, the Court has no power to grant a mandamus to the present mayor and assessors to hold another court. In the case of the *Mayor of Rochester* v. *Reg.* (2) the Court of Exchequer Chamber were by no means unanimous in granting a mandamus. Thirdly, it is discretionary with the Court to grant the writ; and if holding another court to revise the burgess lists would be attended with greater inconvenience than allowing the names of the objected persons to be retained on the lists, this Court will not interfere. In a short time there must be another revision of the lists, when the mischief complained of can be remedied.

Quain, Q.C., and *C. Hutton*, in support of the rule, were not heard.

COCKBURN, C.J. The mayor and assessors were clearly wrong, inasmuch as the notice of objection required by the statute need only contain a description of the person objected to, and that does not imply that it should contain a description of the property. This is the more evident from the statute requiring, as to the objector himself, a description of the property, as well as of the person, to be stated. These notices are in the precise form given in sch. D. No. 3, and are therefore valid.

The next point is, whether the decision of the mayor and assessors is final. I think it is not. Their decision almost amounts to having required a notice where the statute did not require any,

(1) 15 Q. B. 671. (2) E. B. & E. 1024; 27 L. J. (Q.B.) 434.

1870

THE QUEEN v. MAYOR OF MONMOUTH. THE QUEEN v. MAYOR OF BOLTON.

as they held that the notice ought to contain matter which the statute did not require it to contain. They had before them all that was necessary to enable them to exercise their jurisdiction, and therefore it was incumbent upon them to exercise that jurisdiction; they declined to do so upon a ground which is insufficient, and they sought to impose a condition upon the objector with which he was not bound to comply. If any question of fact had been involved in their decision, the circumstances must have been very special to induce this Court to interfere; but where the matter turns upon a mere question of law, which may be solved at once by comparing the notice with the form given in the schedule, and they have erroneously decided that something more was wanted, I am of opinion that by so deciding they have declined jurisdiction under circumstances in which they were bound to exercise it.

The only other point that arises is as to the exercise of our discretion. It is said that, inasmuch as the holding another court for the purpose of revising the list would be attended with inconvenience, we ought not to grant a mandamus. If this case only affected a few votes, which at any future election would not, in all probability, turn the scale, it would not, I think, be a wise exercise of our discretion to issue the writ; but as the number of names objected to is a very large proportion of the total number of names on the burgess list, it is a more important matter, and we ought not therefore to refuse this application.

BLACKBURN, J. I am of the same opinion. I think both cases stand upon the same footing. Section 17 requires a notice of objection to be given to the town clerk, and also to the person objected to; and the notice is to be in the form prescribed by the statute. The notices are in the precise form given by the schedule, but the mayor and assessors held that they were insufficient, and refused to hear the objections. They had no discretion whether they would hear the objections or not, and I therefore think that there was a declining of jurisdiction. I think that *Reg.* v. *Freemen of Leicester* (1) is precisely in point. If persons exercising an inferior jurisdiction, on a mistaken view of the law, refuse to hear

(1) 15 Q. B. 671.

1870

THE QUEEN v. MAYOR OF MONMOUTH. THE QUEEN v. MAYOR OF BOLTON.

a case, they erroneously decline to exercise their jurisdiction; and this Court will compel them by mandamus to hear and decide it. I think, therefore, that the mandamus ought to issue. The next question is, whether we should grant a mandamus to the mayor and assessors now to hold a court to revise the lists which they ought to have revised last October. This might have been doubtful before the decision in *Mayor of Rochester* v. *Reg.* (1) in the Exchequer Chamber. That case is binding upon us, and is an authority that a court may be held at some other time than between the 1st and 15th of October. I think the writ must issue, and, if the defendants think proper, the question can be raised on the return. I do not, however, think a good return could be made. Then as to the question of discretion which was raised in the *Bolton Case*, I quite agree, if there had been only one or two names objected to, we ought not, in our discretion, to issue the writ; but when we find that so large a number of persons are objected to, and nevertheless retained on the list without inquiry, it is impossible not to see that it might make a very serious difference in the state of the municipal constituency. I think, therefore, that the rules ought to be made absolute.

MELLOR, J. Upon the first point, I think that the mayor and assessors have declined jurisdiction; and, on the distinction taken in *Reg.* v. *Freemen of Leicester* (2), the rule for the mandamus ought to be made absolute, inasmuch as, by a mistaken view of the law, an inferior tribunal has refused to hear a case. On the other points I agree with my Lord and my Brother Blackburn.

LUSH, J., concurred.

Rules absolute.

Attorneys in 1st case. For prosecution: *H. T. Naters.*
For defendants: *R. J. Child.*

Attorneys in 2nd case. For prosecution: *Fawcett, Horne, & Hunter.*
For defendants: *C. E. Abbott, for Hinnell, Bolton.*

(1) E. B. & E. 1024; 27 L. J. (Q.B.) 434. (2) 15 Q. B. 671.

1870
Feb. 3.

CLIFF *v.* THE MIDLAND RAILWAY COMPANY.

Railway Company—Evidence of Negligence—Level Crossing over Private Road.

The plaintiff, while passing along an occupation road which crossed the defendants' railway on a level, was knocked down and injured by a train of the defendants, owing, as was alleged, to the defendants' negligence. There were gates across the road left unfastened, and the defendants had at one time kept a gatekeeper, but had ceased to keep one some time before the accident. About three years before the accident the defendants had obtained powers under an Act to make a new road and discontinue the level occupation road; the powers of the Act were to be exercised within five years, and then to cease; and nothing had been done as to the road till after the accident.

The jury negatived negligence in the driver of the engine; but found for the plaintiff on the ground generally of "negligence as to the crossing." The judge, in summing up, had left to the jury as evidence of negligence in the defendants, inter alia, the omission to keep a gatekeeper, and the omission to exercise the powers of their Act:—

Held, a misdirection.

Bilbee v. *London and Brighton Ry. Co.* (18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182) commented upon and explained.

DECLARATION, that the defendants were possessed of a railway which crosses at a level a road leading from a public highway called Mantel Lane to the Snibstone colliery, and the defendants [did not take reasonable and proper care, or use reasonable and proper means, for the protection of persons using the said road where it was so crossed by the said railway, and negligently omitted so to do, and erected and kept improper gates on the side of the said railway where it crosses the said road, and negligently kept the said gates and road open and unfastened], (1) and negligently invited persons to cross the railway on the road when it was dangerous for them so to do, and improperly and negligently drove and managed their trains on their railway; and the plaintiff, whilst lawfully using and entitled to use the road, and being permitted and invited by the defendants so to do, was, owing to the said negligent conduct of the defendants, knocked down by a train of the defendants, and had one of her legs crushed, and was otherwise hurt.

(1) There was a demurrer to so much of the declaration as is between brackets; judgment on the demurrer was, after the argument of the rule, taken for the plaintiff without argument.

1870

CLIFF v. MIDLAND RAILWAY CO.

Pleas: 1. Not guilty. 2. That the plaintiff was not permitted or invited by the defendants to use the way or road as alleged.

Issue joined.

At the trial before Byles, J., at the Leicestershire summer assizes, 1869, it appeared that there was an occupation road for carriages and foot passengers crossing the defendants' line of railway on a level, and leading from a highway called Mantel Lane to the Snibstone colliery; the colliery did not belong to the defendants, and had been worked before the defendants formed their line of railway. In August, 1868, the plaintiff, a girl of between ten and eleven years old, was carrying dinner to her father, who was a workman at the colliery, and the regular train having just passed, she attempted to cross the railway, and, with another girl, was knocked down and injured by an engine and tender which was employed in shunting trucks. In consequence of the Snibstone colliery and other collieries there are many sidings near the spot, and engines and trains more frequently pass at that part of the line than at an ordinary part of the line.

When the defendants' line was originally opened gates were erected across the occupation road, and there was a gatekeeper kept, but the defendants had ceased to keep a gatekeeper some years before the accident, and the gates were left unfastened. There had been several accidents to carts and passengers before—one fatal one—and the attention of the defendants' servants had been called to the dangerous nature of the crossing.

The defendants had obtained an Act (28 & 29 Vict. c. cccxxxv.) (which received the royal assent on the 5th of July, 1865) for many purposes; inter alia, it recited that it was "expedient" that the defendants should be empowered to construct a road in the township of Snibstone, and that the use as a thoroughfare of so much of the above occupation road as crossed the railway should be "prohibited;" and by s. 87 it was enacted that the defendants "may make a new road" to commence from and out of the above occupation road near the point in question, and "may also stop up and discontinue the use as a thoroughfare" of so much of the above occupation road as lies between the fences of and crosses the defendants' railway. By s. 29 the works authorized were to be completed within five years of the passing of the Act, and the

1870

CLIFF v. MIDLAND RAILWAY CO.

powers of the Act for making the same were then to cease. Nothing had been done under the Act at the time of the accident; but afterwards the new road was made, and the level crossing stopped up.

The learned judge, in summing up, expressed his opinion that there was little, if any, evidence of negligence on the part of the driver of the engine; and, after adverting to the previous accidents, and the gate being left without a gatekeeper, told the jury it was for them to say, "looking at what has happened—one fatal accident, the complaints brought to the notice of the company—whether there was not negligence in the company in so managing the crossing. But there was stronger evidence than that. . ." The learned judge then referred to the Act of 1865, and read the recital and the part of s. 87; and pointed out that although they had acquired the powers in 1865, the defendants did not make the new road or close the level crossing till after the accident. "The defendants had therefore, as the plaintiff's counsel said, put upon record that it was a dangerous crossing, and ought to be stopped; yet they did not stop it, but left it with a gate, but without even the protection, which had been there, of a gatekeeper. If, looking at the provisions of the statute, at the former accidents, and the complaints, and also at the fact that there was originally a gatekeeper, and that the gatekeeper had been discontinued, the jury thought there was negligence on the part of the defendants, which led to the accident causing the injury to the plaintiff, they would find for the plaintiff; unless they thought the plaintiff, on the evidence, had been guilty of contributory negligence."

The jury found a verdict for the plaintiff for 250*l.*, negativing negligence on the part of the driver of the engine, but finding generally "negligence as to the crossing;" the judge telling them they need not say what kind of negligence.

A rule was afterwards obtained for a new trial on the ground, inter alia, that the judge misdirected the jury in telling them there was evidence of liability in the defendants.

Bulwer, Q.C., and *Graham*, shewed cause. They contended that there was ample evidence of negligence. They cited and distinguished several cases which the judgment of the Court renders it

unnecessary to give; and they relied especially on *Bilbee* v. *London and Brighton Ry. Co.* (1) as undistinguishable from the present case.

Keane, Q.C., and *Merewether*, in support of the rule, contended that there was no evidence of negligence. *Bilbee's Case* (1) was an exceptional case, and if not exceptional could not be supported, being inconsistent with several other cases.

[LUSH, J., suggested that that case was distinguishable on the ground he afterwards repeated in his judgment.]

The learned judge had directed the jury as if there were a duty in the defendants to keep a gatekeeper, whereas there was no duty imposed on a railway company to keep a gatekeeper at a level crossing over a private road; and as if there had been a neglect of duty in not making the new road and closing the level crossing, whereas the Act was not obligatory but only permissive, and moreover allowed five years for doing it. They referred at length to the judge's summing up.

MELLOR, J. We are of opinion that the rule must be made absolute for a new trial. I quite agree with the learned counsel for the plaintiff to this extent, that when parliament authorizes a company to construct a railway and to work it, it is implied in that that the company are to work it in a reasonably proper manner, in the usual way in which railways are worked; and in crossing a footway on a level the company are bound, as to the mode of working their railway, as to the rate of speed, and signalling or whistling, or other ordinary precautions in the working of a railway, to do everything which is reasonably necessary to secure the safety of persons who have to cross the railway by means of the footway. But as I understand my Brother Byles's summing up, he goes a great deal further than that. [The learned Judge then read a considerable part of the summing up of Byles, J., of which a summary is given above.] By leaving the question thus to the jury he involved the consideration of the provisions of the statute, which he had already said are stronger evidence of negligence than the matters to which he had previously referred. He mixes up the statute with the previous accidents, with the complaints, and with the fact that a gate-

(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.

1870

CLIFF v. MIDLAND RAILWAY CO.

keeper had been discontinued who had formerly been placed there. Now that being so, and coupling it with what passed between the learned judge and the jury when they were discussing the terms of the verdict and the finding with reference to negligence, the learned judge telling them that they were not bound to specify any particular act of negligence, it is clear that the learned judge was under the impression, and so left it to the jury, that all these matters to which I have referred amounted to evidence of negligence; and if in truth one or more of them did not really amount to evidence of negligence, there can be no doubt that the direction would be wrong; because the jury, for aught we know, may have founded their verdict on the fact that this company having power from parliament to stop up and divert the way had not stopped it up and diverted it, although the legislature itself had allowed five years for them to exercise their discretion. The jury may have supposed that the not doing that at an earlier time and before the accident, was evidence of negligence upon which they might find the verdict for the plaintiff; and this is the more probable when we see that the learned judge construed the expressions of the statute as an admission by the company of the dangerous character of the crossing. It is impossible to distinguish these various considerations, and without saying more upon that point, it appears to me that there was an erroneous direction to the jury, which was calculated to mislead them, and may have left it open to them to find a verdict for the plaintiff upon a state of facts which were not evidence of negligence at all; because it appears to me, that it is impossible to say that it was evidence of negligence that the company, having power at their discretion within five years to stop up this way, did not stop it up, and did not divert the road. With reference also to the gatekeeper, I am inclined to think the direction was wrong. I have already said that the legislature, when it authorizes a railway company to construct a railway and to work it, does by implication require that the company shall work it in the ordinary way, and shall take all usual and reasonable precautions in the working of the traffic, in the management of the trains up and down the line, as experience shows to be proper and necessary; and if they failed in that they would be liable to an action for negligence. In this particular case, the jury's attention

was not confined to any negligence in the management of the trains, or in the mode in which they were sent backwards and forwards; but their attention was directed to the question of whether or not it was negligence in not having a gatekeeper, and in not stopping up and diverting the way before the end of the five years which parliament had allowed for that purpose. Now in this state of things I am satisfied that there was or may have been a miscarriage in the verdict of the jury, and that the case must go down for a new trial.

I would also say with regard to the case of *Bilbee* v. *London and Brighton Ry. Co.* (1), which was much pressed upon us by the counsel for the plaintiff, it does appear very difficult to distinguish this case from that, so far as the duty to provide a gatekeeper is concerned, but my Brother Lush has suggested a distinction in the course of the argument, and if it be not the distinction I really cannot suggest any other, viz., that where a railway company are empowered to make their railway and to use it, and to cross a road on the level, and they make a bridge so near as to obstruct the sight of the person who has to cross, so as to impose a difficulty or a danger which was not contemplated by the legislature, they are bound to use extra precautions, and such a case may be distinguished from the present possibly on that ground. I am not very clear that that is a sound distinction, but it is a distinction upon which possibly we might have felt at liberty to act if we had found it necessary to do so. Without expressing any further opinion upon the case of *Bilbee* v. *London and Brighton Ry. Co.* (1), I think, that if the present case cannot be distinguished on the grounds I have mentioned, we should be bound by it in this court. But that is a very distinct question from that on which we are sending the case down for a new trial, namely, that a miscarriage may have arisen from the learned judge leaving as evidence of negligence what appears to us to be no evidence of negligence at all.

LUSH, J. I am of the same opinion. I think that the direction of the learned judge is faulty, inasmuch as it leaves it open to the jury to find a verdict against the company, either upon the ground that they had omitted to divert the road, which they had taken

(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.

1870

CLIFF v. MIDLAND RAILWAY CO.

power to do by the Act of Parliament, as if the Act had imposed an obligation upon them to do it, or on the ground that they had taken away the gatekeeper whom they formerly employed at the crossing, or had omitted some other undefined precaution for the protection of persons going upon and crossing the railway. Now, it seems to me that the company would have no obligation to do either the one thing or the other—no obligation to divert the road, because the Act authorizing them to do so is merely permissive, and no obligation to fence off the road, or to employ any one there to warn persons coming on the road, because no such obligation is imposed by the legislature; and I do not see in this case,—supposing anything a railway company could do would create an obligation,—that the company have done anything here to create that obligation. I think that where the legislature authorizes a railway to cross a way, public or private, upon a level, and does not require from the company any precaution to avoid danger, the legislature intends that the persons who have to cross that line should take the risk incident to that state of things. But, it may be, and I am inclined to think that it is, a sound principle that if the railway company, in the construction of the works so authorized,—in the exercise of the discretion which the legislature has vested in them,—do anything which prevents persons passing over the line from taking care of themselves, and exposes them to greater peril than is ordinarily incident to a level crossing, the company thereby impose upon themselves an obligation to take other than the usual precautions for the protection of persons who have a right to pass there, and, as it were, to make up to the public for that which they have taken away from them. That I take to be the principle of *Bilbee* v. *London and Brighton Ry. Co.* (1) As I read the case, it may be well sustained upon that principle. If it cannot, then I do not see any ground upon which it can be sustained. But it appears to me, although the principle is not enunciated in that specific form, that that is the ground upon which the learned judges in that case acted. It appeared at the trial that the number of trains which passed the crossing was very considerable; that the crossing was on a curve, and that at about 150 yards from it there was a bridge over the line which

(1) 18 C. B. (N. S.) 584; 34 L. J. (C.P.) 182.

obstructed the view of the trains from that direction until they were partly under it. The plaintiff, who was deaf, had partly got on the line; his attention was attracted by an engine which ran by on the up line, and whilst his attention was thus diverted, a down train which passed by at the same time knocked him down. Now, it was pressed, I observe, in the argument for the plaintiff, that this was a peculiarly dangerous place; that trains were perpetually passing; that there was a curve, and a bridge obstructing the view; that some notice or some man might have been placed there, and that a swing-gate was improper. Erle, C.J., who tried the cause, delivered judgment in these terms: "I do not intend to lay down a rule as to footpaths elsewhere, or to interfere with the statute law; the ground of my decision is the great degree of risk in this place. There were many trains; it was on a curve, and near a bridge. The noises of the different trains would interfere with each other, and the bridge would obstruct the sight; and I am therefore unable to say that the judge was bound to non-suit." (1) Now, as I have said, the principle I extract from that decision is this:—The railway company had so constructed their line as to make a sharp curve at the spot where this train passed; they also built a bridge which prevented a passenger from seeing a coming train until it was very near; and on that account the company, having themselves created a peculiar difficulty, and exposed passengers to more peril than the legislature contemplated, and more than was ordinarily incident to a level crossing, undertook the obligation of providing some additional protection. That appears to me the principle upon which that case may well stand; and I think it a sound principle, and one of easy application, distinguishing that case from this, and from many others that have been quoted. Whether the rule was properly applied in that or any other case is not the question. Now, there is nothing of the like kind in this case. There is nothing more here than the level crossing which the legislature has authorized. There were no works of the company which impeded the view of the line and made it more perilous for persons to cross the line, than the legislature must be taken to have been aware of when the Act was passed. Therefore, there being no obligation arising out of the

(1) 18 C. B. (N.S.) at p. 592; 34 L. J. (C.P.) at p. 183.

1870

CLIFF v. MIDLAND RAILWAY CO.

acts of the company, and no obligation imposed by their statute, I am unable to see any duty whatever, and, if there was no duty, the omission to do what they were not bound to do cannot be a ground of complaint. Whether the jury acted upon the view that the company ought to have diverted the road, having obtained powers by an Act of Parliament to do so, or that they ought to have kept a person at the gate to warn people, or ought to have done something else which was not done, I do not know; but I cannot find in the case any facts which, to my mind, create an obligation on the part of the company to do either the one thing or the other. Upon that ground I think that the direction was wrong.

I need hardly say that I agree with my Brother Mellor that in the management of the trains upon a line which crosses a way, whether public or private, upon a level, the company are, of course, bound to use all reasonable care, vigilance, and skill; and the greater the thoroughfare over any part of the line the greater the care and the vigilance that ought to be exercised by those who have the charge of the trains. Those persons ought to anticipate that people may be crossing where they know people have a right to cross. Whatever the degree of traffic may be, be it more or less, a corresponding degree of care is required on the part of the company. Here the jury have exonerated the driver from blame; and the only ground on which the verdict can be sustained is that there is some duty or other resting upon the company to take some undefined precaution, as to which I see no obligation created in point of law.

HANNEN, J. I am of opinion that there ought to be a new trial, for the reasons given by my Brother Mellor. Therefore I abstain from expressing any opinion whether or not this case can be distinguished from *Bilbee* v. *London and Brighton Ry. Co.* (1)

Rule absolute for a new trial.

Attorneys for plaintiff: *Paterson, Snow, & Burney.*
Attorneys for defendants: *Beale, Marigold, & Beale.*

(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.

THE QUEEN *v.* THE MAYOR AND TOWN COUNCIL OF WIGAN. 1870 Jan. 24.

Prison—Contribution by Borough sending Prisoners to County Gaol—Expenses of Enlargement of Prison—5 & 6 Vict. c. 98, s. 18—28 & 29 Vict. c. 126, ss. 23, 24.

A borough sending its prisoners to the county gaol, without any special contract, is liable, under 5 & 6 Vict. c. 98, s. 18, to pay a proportion of the expenses of the enlargement of the prison necessary in order to conform to the requirements of 28 & 29 Vict. c. 126.

RULE, calling on the Council of the borough of Wigan to shew cause why a writ of mandamus should not issue commanding them to pay to the governor of the gaol of Kirkdale 1242*l.* 19*s.* 9*d.* for the conveyance, transport, maintenance, safe custody, and care of Wigan prisoners in the gaol from the 1st of December, 1867, to the 30th of November, 1868, and, if necessary, to make and levy a rate for that purpose. (1)

(1) Under 5 & 6 Vict. c. 98, s. 18, which enacts:—"In every borough to which a separate court of sessions of the peace hath been or shall hereafter be granted, or purported to be granted, and where the persons committed for offences arising within such borough have been, or shall hereafter be, sent to any prison of the county in which such borough is situated, and that no special contract shall be subsisting between such borough and county relative to the said prisoners, the council of such borough shall pay or cause to be paid to the treasurer of such prison, or other person appointed by the justices of the peace in general or quarter sessions assembled, for the county in which such prison is situated, the actual expenses heretofore incurred, or hereafter to be incurred, in the conveyance, transport, maintenance, safe custody, and care of every such prisoner, according to the time for which each such prisoner shall have been or shall remain in custody there, at the average daily cost of each prisoner, according to the whole number of prisoners confined in the said prison, such average to be taken yearly, half-yearly, quarterly, or at such other intervals as the visiting justices of the prison shall from time to time determine, including in such expenses all salaries of officers, *all expenses of repairs, alterations, additions, and improvements in or to the said prison*, all sums paid to prisoners under any Act of Parliament on their discharge or otherwise, and any other charge whatsoever on account of the prisoners confined in such prison; subject nevertheless to a proportional share of all deductions on account of the earnings of prisoners in the said prison, and of all sums of money received in aid of the rates levied for the maintenance of the said prison . . ."

By s. 20, the above expenses are to be defrayed out of a rate made and levied for the purpose by the council of the borough in the same way as a borough rate; and in case of dispute as to the amount, it is to be settled by a barrister agreed upon between the visiting

1870

THE QUEEN v. WIGAN.

The borough of Wigan, which has a separate court of quarter sessions, had for some years sent its prisoners to the county gaol at Kirkdale, without any special contract.

During the year from the 1st of December, 1867, to the 30th of November, 1868, some extensive alterations and repairs and additions took place in the prison in order to make the prison conform to the Prisoners Act, 1865 (1), under the sanction and express requirement of the Secretary of State. The additions consisted of a corridor containing 132 cells, cookhouse, bakery, washhouse, laundry, male and female hospitals and fever wards, storehouse, chief warder's house, and house for female officers.

During the above period the number of Wigan prisoners, from exceptional and temporary causes, had been far above the average.

The council of Wigan offered to pay the amount of expenses appropriate to their prisoners, but objected to pay the proportion of the expenses of the alterations and enlargement of the prison.

H. S. Giffard, Q.C., and *Baylis*, shewed cause. No doubt the words of 5 & 6 Vict. c. 98, s. 18, are very large, but it never could have been intended that such an extensive and permanent enlargement of the county prison should be included in the expenses of the borough prisoners. The matter was in the hands of the county justices, and they had taken advantage of the unusual number of Wigan prisoners so as to cause an unfair proportion of the expenses to fall on the borough, instead of borrowing the money, and extending the payment over several years.

Holker, Q.C., and *Gorst*, were not heard in support of the rule.

THE COURT (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.) were clearly of opinion that the case came within s. 18. The words were quite large enough to include such a case; and justice required

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justices and the council, or in default of such agreement by a barrister to be appointed as under 5 Geo. 4, c. 85.

(1) 28 & 29 Vict. c. 126, makes additional requirements as to the discipline, classification, and separation of prisoners; by ss. 23, 24, the prison authorities may alter, enlarge, or rebuild all or any parts of the prison, on the certificate of the visiting justices, sanctioned by the Secretary of State; and by s. 35 the government allowance may be withheld, by the certificate of the Secretary of State, from any prison, if the requisitions of the Act have not been complied with.

1870

THE QUEEN v. WIGAN.

that the borough should contribute towards the additional buildings made necessary, in part no doubt, by the borough prisoners. If there was anything inequitable in the proportion charged to the borough owing to the exceptional number of the Wigan prisoners, that might have been ground for contesting the amount in the proper manner, but was no ground for refusing to pay the contribution altogether.

Rule absolute.

Attorneys for prosecutors: *Birchall, Wilson, & Hulton, Preston.*
Attorneys for defendants: *Sharpe, Parkers, & Pritchard.*

THE QUEEN *v.* GARLAND AND ANOTHER.

Jan. 28.

Devise of Copyholds, effect of—Wills Act, 7 Wm. 4 & 1 Vict. c. 26, s. 3—Discretion to refuse Mandamus, where inequitable to grant it.

A testator, having been admitted to copyhold hereditaments, devised them in fee to two trustees in trust for the benefit of his family, whom he also appointed guardians to his infant son, his customary heir. The trustees proved the will, but did not claim themselves to be admitted to the copyholds, but called upon the lord of the manor to admit the infant heir by his guardians. The lord refused on account of the devise. If the two devisees had been admitted, the lord would have been entitled to a double fine instead of a single fine on the admittance of the heir. The Court refused a mandamus to compel the lord to admit the heir, on the ground that it was a matter of discretion, and they would not grant the writ, as the effect of granting it would be to enable the trustees to evade payment of a double fine, and to commit a breach of trust by not acquiring themselves the legal estate.

Quære, whether by s. 3 of the Wills Act, 7 Wm. 4 & 1 Vict. c. 26, a devise of copyholds divests the heir at once of all estate; or whether the effect of the section is only to enable a copyholder in all cases to devise his estate; dispensing with a surrender to the use of the will, and leaving the estate in the heir till the admittance of the devisee.

RULE, calling on E. W. Garland, lord of the manors of Wix Park Hall and Wrabness, in the county of Essex, and his steward, to shew cause why a writ of mandamus should not issue commanding them to hold a court and admit William Gould Busk, by his guardians, as tenant to the copyholds, holden of the said manors respectively by Edward Thomas Busk, deceased, to whom the said W. G. Busk is customary heir.

Edward Thomas Busk died in January, 1868, seised of certain

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1870

THE QUEEN v. GARLAND.

copyhold tenements of the above manors, to which he had been duly admitted to him and his heirs according to the custom of the manors, and leaving William Gould Busk, his youngest son, his customary heir to the tenements; and by his will he appointed his widow, his brother Henry William Busk, and his nephew Edward Henry Busk, the guardians of his infant children.

The lord of the manors having notice of the heirship, and having been called upon at a court held in June, 1869, by E. H. Busk, as guardian to the infant heir to admit him, refused, on the ground, entered on the minutes of the court rolls, that by extract from the will and codicils of the late Edward Thomas Busk, it appeared [as the fact was] that the said E. T. Busk devised his copyhold tenements, of which he died seised, to his brother Henry William Busk, his cousin Hans Busk, and his nephew Edward Henry Busk.

The devise was to the use of the three trustees on certain trusts for the benefit of the testator's family.

Hans Busk, by deed of the 17th of March, 1868, disclaimed the devise and the trusts, and the other two trustees duly proved the will.

The devisees had not claimed admittance.

The rule was obtained on the affidavit of E. H. Busk, disclosing the above facts. It was agreed on the argument, that the lord would, on the admittance of the two devisees, have been entitled to a double fine, i.e., a fine and a half, instead of a single fine to which he would be entitled on the admittance of the heir.

Mellish, Q.C., and *Herschell*, shewed cause. They contended that under the Wills Act (7 Wm. 4 & 1 Vict. c. 26, s. 3), (1) the copy-

(1) By 7 Wm. 4 & 1 Vict. c. 26, s. 3, it is enacted, "That it shall be lawful for every person to devise, bequeath, or dispose of by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed, or disposed of, would devolve upon the heir at law, or customary heir of him, or, if he become entitled by descent, of his ancestor, or upon his executor or administrator; and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right, or customary or copyhold, notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee, or otherwise to be admitted

holds passed by a devise direct to the devisee, and the heir was divested of all title and interest unless the devisees disclaimed; just as in the case of freeholds: they relied on the terms of s. 3 itself, and of ss. 4 and 5. Here the devisees had not disclaimed; and moreover they were trustees, and had taken upon them the trusts, and they therefore could not disclaim, and a court of equity would compel them to be admitted. [They referred to *Rex* v. *Wilson* (1); Scriven on Copyholds, 4th ed., p. 211, pt. 1, ch. 4, "Surrender to Will;" and p. 293, pt. 2, ch. 6, "Of Admittance;" *Steele* v. *Waller* (2); *Paterson* v. *Paterson.* (3)]

Joshua Williams, Q.C., and *Tindal Atkinson*, in support of the rule, contended that the effect of s. 3 of 7 Wm. 4 & 1 Vict. c. 26, was no greater than that of 55 Geo. 3, c. 192, s. 1, viz., it only dispensed with the necessity of a surrender to the use of a will, and enabled copyholders in all cases to devise their copyholds; but the estate remained in the customary heir until the devisee claimed and obtained admittance; all that passed by the devise to the devisee was this right to admission. Where there was any doubt as to the title the lord was bound to admit all parties who claim. They cited *Rex* v. *Hexham* (4); *Doe* v. *Harrison* (5); *Bristow* v. *Booth* (6); and, on Cockburn, C.J., pointing out that the devisees were trustees, and were bound to claim admittance, and take the legal estate, they argued that this Court could only take notice of the legal rights and title of the parties, irrespective of any equitable rights, and for this they relied on *Rex* v. *Wilson* (1), and *Wellesley* v. *Withers.* (7)

[LUSH, J., referred to *Bence* v. *Gilpin.* (8)]

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thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will, if this Act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will shall continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this Act, if this Act had not been made . . ."

(1) 10 B. & C. 80.

(2) 28 Beav. 466, 469.

(3) Law Rep. 2 Eq. 31.

(4) 5 A. & E. 559.

(5) 6 Q. B. 631.

(6) Law Rep. 5 C. P. 80.

(7) 4 E. & B. 750; 24 L. J. (Q.B.) 134.

(8) Law Rep. 3 Ex. 76.

1870

THE QUEEN v. GARLAND.

COCKBURN, C.J. I am of opinion that this rule must be discharged. I do not ground my judgment on the construction of s. 3 of the Wills Act, for at present I am disposed to agree with Mr. Williams that the effect of it is only to dispense with the necessity of a surrender to the use of the will, and I cannot think that it has the effect of conveying the estate into the devisee before admission; and if it were necessary to decide that question in the present case, I should grant the mandamus in order to put the point, which is of some importance, into train for solemn determination. But I rest the refusal of the writ entirely on the special circumstances of the case, and on the ground that, in the exercise of that discretion which we have to grant or refuse the extraordinary process of the court, we ought to refuse it in the present case. Now, it is said the present is not a bonâ fide application on the part of the heir, and, moreover, the effect of granting the writ would be to enable the trustees to avoid the performance of what, as trustees, it is their duty to do; and it is said that this is a fraud, and that the trustees are putting forward the heir only in order to defeat the lord of his right to an additional fine in respect of the admission of the two devisees. It is clear that the application is not on behalf of the heir with a view to enforce any right of his, but simply for the purpose of enabling the trustees to avoid the payment of a double fine, for it is perfectly plain that the heir at law has no more personal interest in the matter than a mere stranger. The effect of granting the mandamus would be most prejudicial; it would simply be that the trustees would be enabled to evade the discharge of a duty which a court of equity would and must enforce against them. They are by the will to take the estate for the performance of certain trusts, and they can only acquire the legal estate by claiming to be and getting themselves admitted. By what they are now doing they are virtually declining the trusts, though they have not disclaimed; and they are doing what is directly contrary to the testator's intention: because, if he had wished to make his heir trustee, so as to avoid the expense of the double fine, he could have done it by his will. By granting the mandamus we should be lending our process to that which must eventually produce this effect, that, instead of there being proper persons to act as trustees in dealing with the

property, there would be trusts to be performed by the infant heir, who, for aught we know, is a mere child. It is only when the process is ordinary process to which the parties are entitled ex debito justitiæ that a court of law looks only at the legal position of the parties. *Rex* v. *Wilson* (1), and *Wellesley* v. *Withers* (2), are quite distinguishable. In the first case there was no trust, and the devisees chose to disclaim, and the heir was held entitled to admittance. In the present case two of the devisees have not disclaimed, and being trustees they cannot disclaim, unless they had divested themselves of all the trusts, which they have not done. In the other case there was a devise of copyholds to three; they all proved the will, but two of the three disclaimed the devise, and it was held that the third was entitled to be admitted on the payment of a single fine. So here, if all the trustees but one had disclaimed, and the question had been whether he ought to be admitted on payment of a single fine, that case would have been in point. Here the trustees have not disclaimed, and ought, therefore, to be admitted, and by endeavouring to escape from being admitted while retaining their trusts they are abandoning their duties. This writ, therefore, not being ordinary process ex debito justitiæ, we ought, in the exercise of our discretion, to refuse it.

MELLOR, J. If the decision of the case depended on the construction to be put on s. 3 of the Wills Act, I certainly should not have consented to the rule being discharged, as the question is one of some nicety and considerable importance, and I am disposed to agree with the Lord Chief Justice. On the other point, although I do not formally dissent, I do not see my way so clearly as the Lord Chief Justice and my Brother Lush, to discharging the rule. There are expressions of the judges in *Rex* v. *Wilson* (1) and other cases which have great weight with me, and I have very considerable doubt, assuming Mr. Williams' construction of s. 3 to be right, whether we are at liberty to decline to make the rule absolute for a mandamus on the ground put forward by the Lord Chief Justice, though, no doubt, there is most excellent sense in what the Chief Justice has said.

(1) 10 B. & C. 80. (2) 4 E. & B. 750; 24 L. J. (Q.B.) 134.

1870

THE QUEEN v. GARLAND.

LUSH, J. I am of opinion that the rule ought to be discharged on the ground stated by the Lord Chief Justice. By discharging the rule we are not depriving any party of any rights; we are only refusing to lend our process for the purpose of enabling the trustees to do what is inequitable and improper. The heir has really no interest in the matter, but the trustees are seeking, by putting the heir forward, to deprive the lord of a fine, and by this means they would be enabled, if not to repudiate the trusts, at all events, to avoid carrying out the intention of the testator. They are making the application not really as guardians, but as trustees, in order, instead of putting themselves on the roll, by getting the heir admitted, primarily to deprive the lord of his double fine; but the secondary and necessary consequence would be to clothe an infant with the duties of a trustee.

As to the other point, I own that, were it not for the doubt expressed by the other members of the Court, I should have had no hesitation in saying that the intention of the Wills Act was to remove all existing obstacles to the free transfer of property, and to put all kinds of property on the same footing as freehold estates; and that, in order to facilitate this devolution of property, s. 3 intended to make a will a direct conveyance of copyhold estate, just as of freeholds; so that by a devise of copyholds the customary heir would be entirely and at once deprived of all title and interest, and the devisee put in his place, though admittance of the devisee, just as of the heir, would still be necessary to complete the legal title. This, however, would have been a matter of too great importance to decide summarily by refusing the rule for a mandamus; but, for the reasons given by the Chief Justice, I concur that this rule should be discharged.

Rule discharged.

Attorneys for prosecution: *Cookson, Wainewright, & Co.*
Attorneys for defendants: *Winter, Williams, & Co.*

[IN THE EXCHEQUER CHAMBER.]

1870
Feb. 2.

MARKS *v.* FELDMAN.

Bankruptcy—Fraudulent Preference—Transactions voidable at Option of Assignee—Bankrupt's own Petition—Relation.

Where goods have been assigned to a creditor by a debtor on the eve of bankruptcy under circumstances which make it a fraudulent preference, and the goods have been sold by the creditor before the bankruptcy, it is immaterial that the adjudication was on the bankrupt's own petition, so that the fraudulent preference was not void as an act of bankruptcy to which the assignees' title could relate; the assignees may still recover the proceeds from the creditor, inasmuch as a transaction amounting to a fraudulent preference is voidable at the election of the assignees, as contrary to the spirit of the bankruptcy laws.

APPEAL from the decision of the Court of Queen's Bench making a rule absolute to enter a verdict for the defendant. (1)

The action was by the plaintiff as assignee of one J. P. Jackson, a bankrupt. The first count was for converting to the defendant's use the goods of the bankrupt before the bankruptcy; second count, for converting the goods of the plaintiff, as assignee, after the bankruptcy; third count, for money received for the use of the plaintiff as assignee.

Pleas: 1. To the first and second counts, not guilty. 2. To the first count, that the goods were not the goods of the bankrupt. 3. To the second count, that the goods were not the goods of the plaintiff as assignee. 4. To the third count, never indebted.

Issue joined.

At the trial, before Hannen, J., at the York spring assizes, 1868, the following facts were proved. On the 26th of July, 1867, the bankrupt Jackson executed and delivered to the defendant, as a security for a debt then due from him to the defendant, a bill of sale by which, after reciting that the bankrupt was indebted to the defendant in the sum of 300*l.* for goods sold and delivered, the bankrupt assigned to the defendant his household furniture, goods, chattels, stock in trade, and effects; with a power to the defendant to enter the bankrupt's premises, and sell the goods comprised in the bill of sale, if the amount owing to the defendant were not paid on demand.

(1) Law Rep. 4 Q. B. 481.

1870

MARKS v. FELDMAN.

On the 16th of November, 1867, the bankrupt was adjudicated a bankrupt upon his own petition, dated and filed on the same day. Before the 16th of November the defendant, under the bill of sale, had seized the goods assigned to him, and sold them and received the proceeds of the sale.

The plaintiff, at the trial, abandoned the counts in trover; but claimed the proceeds of the sale under the count for money had and received, on the ground that the bill of sale was a fraudulent preference by the bankrupt of the defendant, as one of his creditors, made by the bankrupt in contemplation of bankruptcy; and evidence having been given in support of and against that claim, the only matter of fact in dispute was, whether the bill of sale was a fraudulent preference or not; and the learned judge having left that question to the jury, the jury found that the bill of sale was a fraudulent preference, and thereupon gave their verdict for the plaintiff on the third count for 202*l.* 6*s.* 10*d.* The learned judge then gave the defendant leave to move to enter a verdict for him.

A rule was obtained, on the ground that there was no relation back to the date of the bill of sale so as to entitle the plaintiff to recover; and the Court of Queen's Bench made the rule absolute. (1)

Quain, Q.C. (*Forbes* with him), for the plaintiff. The judgment in the Court below proceeded on the technical ground, that in an action of trover the plaintiff must shew a title to the goods at the time of bringing the action, and that where the goods have been sold the money represents the goods, and the action for the proceeds as money had and received is governed by the same principle. If this case is governed by this technical rule, the consequences that would follow would be most serious; for if a trader, on the eve of his bankruptcy, assigned his goods to one favoured creditor, and was next day adjudged bankrupt on his own petition, the favoured creditor would get 20*s.* in the pound, and the rest of the creditors nothing. This would be directly against the spirit of the bankrupt laws. The Court below have confounded two things—the doctrine of fraudulent preference, and that of relation back. *Stevenson* v. *Newnham* (2) shews in what cases the assignees can

(1) Law Rep. 4 Q. B. 481.
(2) 13 C. B. 285, 302; 22 L. J. (C.P.) 110.

1870

MARKS v. FELDMAN.

treat a transaction as a fraudulent preference; and in the judgment of the Court of Exchequer Chamber it is said, that "such acts, when voluntary and in contemplation of bankruptcy, cannot be valid against assignees if they choose to avoid them, but they are not absolutely void." The cases decided upon ss. 1 and 2 of 3 Geo. 4, c. 39, are analogous to the present, which required cognovits and warrants of attorney to be filed within twenty-one days after execution, and declared that unless they were so filed they should be void as against the assignees of a bankrupt. The point that trover would not lie was first taken in *Brook* v. *Mitchell* (1), where the assignee of a bankrupt sought to recover goods seized under a fi. fa. issued on a judgment signed on a warrant of attorney not filed within twenty-one days, and it was held that trover would not lie, but the Court intimated that money had and received to the use of the assignee would; and in *Biffin* v. *Yorke* (2) it was expressly held that, under similar circumstances, the assignees of an insolvent could recover back the proceeds of goods as money had and received. No doubt there is a distinction between the present case and those under that statute, as it expressly provides that the assignees should be entitled to recover for the use of the creditors all moneys levied and goods seized under such execution. But the principle is the same, and that provision makes no difference. Here the deed of assignment is good between the parties, but void as against the assignees, just as a judge's order given by a trader debtor to his creditor, and not filed as required by s. 137 of 12 & 13 Vict. c. 106, is valid between the parties, but void as against his assignees if he afterwards become bankrupt: *Bryan* v. *Child* (3); and if judgment is signed on it, and execution issued, the assignees are enabled to recover back the proceeds in an action for money had and received, and this although s. 137 contains no provision that it should be so recovered back: *Farrow* v. *Mayes*. (4) In *Young* v. *Billiter* (5) an insolvent debtor fraudulently gave his creditor a warrant of attorney, on which judgment was signed and execution issued, and the goods of the debtor were seized and sold; it was held that the assignee could not treat the transaction as void from

(1) 6 Bing. N. C. 349.
(2) 5 M. & G. 428.
(3) 5 Ex. 368; 19 L. J. (Ex.) 264.
(4) 18 Q. B. 516.
(5) 8 H. L. C. 682; 30 L. J. (Q.B.) 153.

1870

MARES v. FELDMAN.

the beginning, and maintain trover on an alleged wrongful conversion. But Blackburn, J. (1) seemed to be of opinion that an action for money had and received would lie. And Lord Wensleydale (2) says the warrant of attorney was merely voidable, and what was done under it could not be made the subject of *this* action. In *Heilbut* v. *Nevill* (3) Willes, J., points out that the law of fraudulent preference is quite distinct from any relation back of the assignee's title. The transaction in the present case is a fraudulent preference, and void against the assignee, as being against the spirit of the bankrupt laws, and the action for money had and received will lie to recover back the proceeds of the goods.

Field, Q.C., for the defendant. The case was rightly decided in the Court below. The assignment as between the parties was valid, and as the sale was complete before any act of bankruptcy, and the adjudication is on the bankrupt's own petition, it has no relation back so as to give the assignee a title to the goods or to the money which is the proceeds of the goods. At the time of sale the goods were legally the goods of the defendant, and the money for which they were sold never could have been the money of the assignee. It is conceded that trover will not lie, and it follows that money had and received will not. *Brook* v. *Mitchell* (4), and *Biffin* v. *Yorke* (5), are distinguishable. Those cases were decided on the express words of 3 Geo. 4, c. 39. There is no authority for saying that money had and received will lie under the circumstances of this case. *Young* v. *Billiter* (6), shews that in the case of an insolvency, which is analogous to a bankruptcy on the bankrupt's own petition, there is no relation back so as to enable the assignees to maintain the action.

[WILLES, J., referred to *Harman* v. *Fishar*. (7)]

Quain, Q.C., was not heard in reply.

KELLY, C.B. This is an action brought by the assignee of a bankrupt against the defendant, who has possessed himself under a bill of sale of certain goods. At the time of the transaction in

(1) 8 H. L. C. p. 693; 30 L. J. (Q.B.) at p. 156.
(2) 8 H. L. C. at p. 707.
(3) Law Rep. 4 C. P. 354, 359.
(4) 6 Bing. N. C. 349.
(5) 5 M. & G. 428.
(6) 8 H. L. C. 682; 30 L. J. (Q.B.) 7 Jur. N.S. 209 2 Jur. N.S. 753. 7 Jur. N.S. 269
(7) 1 Cowp. 117.

question, the goods were the property of the bankrupt, but the bill was given under such circumstances as, it was contended on the part of the plaintiff, constitute a fraudulent preference. The learned judge left the question to the jury whether, upon the whole of the evidence, the bill of sale of the goods by the bankrupt to the defendant was a fraudulent preference. The jury found that the transaction was a fraudulent preference, and a verdict was entered for the plaintiff, but with leave reserved to move to enter a verdict for the defendant. A rule was accordingly obtained, on the ground that there was no relation back to the date of the bill of sale, so as to entitle the plaintiff to recover.

The rule seems to me to have been framed with a total disregard to the law as to fraudulent preferences. Except so far as it may or may not be an act of bankruptcy under the provisions of the bankruptcy statutes, the doctrine of relation has no application to a fraudulent preference. If a man at a time when he contemplates bankruptcy delivers goods or money into the hands of a creditor whom he intends to benefit, that transaction is perfectly valid between the parties; but if bankruptcy supervenes, and there is an adjudication against the transferor or donor, it is a fraudulent preference and invalid as against the assignees, not under any express provision in the bankruptcy laws, but as contrary to the spirit and principle of those laws. Section 67 of the Bankruptcy Act, 1849, may therefore be dismissed from consideration as having nothing to do with the grounds of our judgment; for it is not as an act of bankruptcy that this transaction was invalid, but simply as a fraudulent preference; as to which the doctrine of relation has no application.

Upon these grounds it appears to me, if the objection had been made on the part of the plaintiff upon the argument of this case, that the rule being founded only on the doctrine of relation, that is, that the adjudication in this case had no relation back to the transaction, we must have held that the point now taken as to fraudulent preference was not within the rule; and on this ground, the rule ought to have been discharged. But as the point was not insisted on either in the Court below, nor in this Court, I proceed at once to the question whether, upon the merits of the case, the plaintiff is entitled to recover.

1870

MARKS v. FELDMAN.

It is contended on behalf of the defendant that the plaintiff is not entitled to recover, because this particular transaction was good and valid in itself, and was not void even as against the plaintiff, the assignee, and that the assignee's right only existed while the goods remained in specie in the possession of the defendant, and not after the defendant had converted them into money. Now I am of opinion that this is not the law, and that under the circumstances of this case the delivery of the goods to the defendant, by way of fraudulent preference as found by the jury, though a perfectly valid transaction in itself, was voidable by the assignee in the event of a subsequent adjudication of bankruptcy. The question that first arises is whether the transaction continues to be voidable only as long as the goods remain in specie in the possession of the defendant, and ceases to be voidable after the goods are converted into money. It seems hardly to be denied, supposing an action of trover had been brought against the defendant, after a demand and refusal and an election to avoid the transaction, that an action would lie; for while the goods remained in the defendant's possession the transaction was voidable by the assignee if he thought fit to avoid the transaction by demanding the goods; and the assignee having avoided the transaction, the goods are no longer the goods of the defendant, but have become the goods of the assignee. Now, is this altered by the circumstance that the defendant has sold the goods, and possessed himself of the money, the proceeds of the goods before the bankruptcy, and before the transaction is avoided? I am clearly of opinion that it is not. It is an incorrect statement of the law to say that this transaction was valid to all intents and purposes, or that it became valid to all intents and purposes after the conversion of the goods into money. It appears to me that whether the defendant, the transferee or bailee, in the case of a fraudulent preference, remains possessed of the goods, or whether he converts them into money, the transaction still retains its original character; it is good and valid as between the parties, but it is still voidable by the assignee. He may avoid it by demanding the goods as long as the goods remain in the possession of the transferee, and he may also avoid it by demanding the money whenever those goods may have been converted into money. I need not refer to the maxim

of law that it is not by any circuitous proceeding that a right of this nature belonging to the assignees of a bankrupt can be defeated; and that a transaction voidable by the assignees does not cease to be voidable by the act of the party who has been privy to the unlawful act, and because he has changed the nature of the property, and so has changed the remedy to which the assignees may be entitled.

Here, the transaction was voidable at the suit of the assignee from the time the property of the bankrupt became vested in the assignee. He might have avoided it, and maintained an action of trover if the goods had remained in the possession of the transferee, and after the latter has converted the goods into money the transaction still remains unlawful as against the assignee, voidable by him, voidable as against him; and the only difference is that, whereas the remedy would be an action in trover after a demand, that is, after an avoidance by way of demand while the goods were in specie and in the hands of the transferee, when the goods have been converted into money the assignee becomes entitled to maintain an action for money had and received, after a demand for the money so had and received; the transaction remaining in effect the same, and the remedy only differing.

With regard to the difficulties which have been raised here and in the Court below as to the form of action, if originally the fraudulent preference had consisted in the payment of a sum of money into the hands of the defendant, it can hardly be disputed, unless indeed we at once abrogate the law as to fraudulent preferences, that an action for money had and received could have been maintained against the favoured creditor. What difference can it make whether the avoidance takes place while an action of trover can be maintained by a demand of the goods, or after demanding the money when the goods have been converted into money, and the remedy of the assignees is an action for money had and received?

I think, therefore, under all the circumstances it is a fallacy to say that the defendant received these goods, or afterwards received the money, the proceeds of the goods, under an absolute good title. It was a good title, no doubt, as between him and the bankrupt, but it was a title defeasible in the event of a subsequent bankruptcy and an avoidance of the transaction by the assignee, an avoidance which could be carried out by the assignee demanding the goods

1870

MARKS v. FELDMAN.

if they were still in the hands of the defendant, or by a demand of the money when he had converted the goods into money.

Upon these grounds, I am of opinion that the judgment of the Court of Queen's Bench must be reversed.

MARTIN, B. I am of the same opinion. I do not mean to throw any doubt upon the question that an action for money had and received is maintainable, because that has been said by several judges in several cases; nevertheless it seems to me that that is the only arguable part of the case; but in my opinion it is not essential in the present case to give any judgment on that point. There is no doubt that an action for money had and received, generally speaking, is applicable where the plaintiff has a right to recover the money immediately upon the receipt of it by the defendant. That was not the case here, because when the money, the proceeds of the goods, was received by the defendant, the bankruptcy had not taken place, and therefore, at that time, the money was the defendant's own money, just as much as the goods were the defendant's own in the case of *Young* v. *Billiter*. (1) In that case the struggle was to prevent a technical objection, which would not prevail in an action on the case stating the circumstances, from operating, and to decide the real question in controversy between the parties.

Now, if a defendant means to object that on the declaration as framed the plaintiff cannot recover, although in justice he is entitled to recover, the defendant must state that objection plainly and distinctly, and call the attention of his opponent and of the judge to it, in order that the judge may take the step which the legislature imposes upon him, under s. 222 of the Common Law Procedure Act, 1852, of making such an amendment as is necessary for the purpose of determining the real question in controversy. It seems to me, therefore, that the question which has been raised by Mr. Field, and which has been argued before us, does not arise in this case.

I will state to the best of my ability what does arise, as it seems to me, in this case. The ground of the rule shews that the point taken in the Court of Queen's Bench was that there was no relation back to the date of the bill of sale, so as to entitle the plaintiff to

(1) 8 H. L. C. 682; 30 L. J. (Q.B.) 153.

1870

MARKS v. FELDMAN.

recover. That was the point the Court decided, and therefore the only question is, whether the fact that there was any relation back to the date of the bill of sale was essential to the recovery of the plaintiff, and I am clearly of opinion it was not. [The learned Judge then read the chief parts of the case.] Looking at the statement of what occurred at the trial, the only matter in dispute was, whether the bill of sale was a fraudulent preference or not, and the learned judge leaves that as the only question. And it is now sought to raise two questions, first, whether a demand was made; and secondly whether an action for money had and received is maintainable. But I think that cannot be done, the only question is with respect to this bill of sale being a fraudulent preference. Now, as long ago as the year 1768, this question arose, I believe, for the first time before Lord Mansfield in *Alderson* v. *Temple*. (1) There Lord Mansfield lays down what a fraudulent preference is; and that he was under no error or mistake in the matter is clear, for he says distinctly what the law was, that under the statutes of bankruptcy a trader up to the moment of an act of bankruptcy was entitled to every power an owner can have over his estate. He then proceeds to establish an exception, that if a man about to become bankrupt, and knowing that the law intends that the creditors shall share equally in the property, voluntarily and not upon pressure does an act which contravenes the spirit of those bankruptcy laws, the goods or the money delivered or paid over can be recovered back from the person to whom he may have only paid a just debt. Though it was a perfectly moral transaction in itself, because every man is entitled to receive 20*s.* in the pound, nevertheless, Lord Mansfield laid it down most distinctly, that the goods were recoverable back. Though there are many cases which are mixed up with questions as to acts of bankruptcy, that is in truth the foundation of this law of fraudulent preference; and the same law is laid down by Littledale, Parke, and Patteson, JJ., in *Morgan* v. *Brundrett*. (2) Relation has nothing to do with it, nor whether it is an act of bankruptcy. If it were available as an act of bankruptcy, then the title of the assignee relates back to the act of bankruptcy, and the bankrupt after that time would be dealing with another person's property, the property having become

(1) 4 Burr. 2235. (2) 5 B. & Ad. 289.

1870

MARKS v. FELDMAN.

the property of the assignee for the benefit of the general creditors; but a fraudulent preference is void independently altogether of relation. That being so, it is clear to my mind that there has been a misapprehension in this case, since it was decided, that though this was a fraudulent preference and a voidable transaction, or a void act as against the assignees, yet the defendant was entitled to keep the money. We must look at this as if the declaration stated the real facts. I am not insensible to the difficulty suggested by Mr. Field, that if this be law, it gives a man an opportunity of avoiding his own act; but inconveniences just as great may be suggested on the other hand. In my judgment, as far as I can see, whether the bankruptcy was obtained by a creditor hostilely, or was obtained by the bankrupt on his own petition, the law of fraudulent preference remains the same. If the act is done in contemplation of bankruptcy, it has the effect of defeating the law, which says that the creditors are entitled to all the bankrupt's property; and if a man attempts to defeat that right by voluntarily parting with his goods, in my opinion they are recoverable back; and whether it is by an action of trover, or an action for money had and received, or any other action, is utterly immaterial, the substance is, that the goods or the value may be got back. I am therefore of opinion, that the judgment of the Court of Queen's Bench ought to be reversed.

WILLES, J. I am of the same opinion. Dolus circuitu non purgatur.

CHANNELL, B. I do not wish to be understood as intimating any doubt as to whether there was—and, looking at the terms of the special case, I am of opinion there was—such a demand before action brought as to entitle the assignees to avoid the transaction, and therefore to recover. Upon these grounds I am of opinion that the judgment ought to be reversed.

PIGOTT and CLEASBY, BB., and BRETT, J., concurred.

Judgment reversed.

Attorneys for plaintiff: *Singleton & Tattershall, for Unwin, Sheffield.*

Attorneys for defendant: *Doyle & Edwards, for Edwin Allen, Birmingham.*

WOODWARD *v.* BUCHANAN. 1870

Jan. 12.

Evidence—Relevancy to Issue—Evidence to charge Defendant with Work done by Plaintiff to Houses, that the Defendant had given Orders to other Persons about same Houses.

On the trial of an action by the plaintiff against the defendant for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the houses or the real principal, evidence is admissible that other persons had received orders from the defendant to do work at the same houses, without shewing that the plaintiff knew of these orders at the time he did his work.

CASE stated on appeal from the county court of Gloucestershire holden at Gloster.

The action was brought by the plaintiff, a plumber and glazier, against the defendant, for 31*l.* 17*s.* 5*d.*, being a balance of an account for work done and materials supplied, from the 30th of December, 1866, to the 5th of July, 1867, in respect of some dwelling houses in Vauxhall Road and Twyer Street, which at the commencement of the work being done and materials being supplied were being erected by one George Lewis and William Bourgoyne respectively.

Lewis and Bourgoyne originally applied to the plaintiff to do the work and supply the materials; but after he had done a small part of the work he refused to do any more work or supply any more materials. He was then informed by Lewis and Bourgoyne that they were erecting the houses for the defendant, whereupon (as was alleged by the plaintiff, but denied by the defendant) the plaintiff applied to the defendant and received from him personal orders to do the work and supply the materials.

It was contended on behalf of the defendant, and evidence was given in support of his contention, that credit had been given by the plaintiff to Lewis and Bourgoyne; that the defendant was only mortgagee, not in possession of the premises; that he had not given any orders or made any promises to the plaintiff; and that if the defendant had made promises to pay the plaintiff it was made on account of the debt and default of Lewis and Bourgoyne, and was therefore void, not being in writing, as required by the Statute of Frauds.

1870

WOODWARD v. BUCHANAN.

It was contended on behalf of the plaintiff, and evidence was given in support of such contention, that the defendant was really the owner and personally interested in the premises; that Lewis and Bourgoyne were simply his agents; that if the defendant was mortgagee only, he was mortgagee in possession; that he had held himself out as owner; and that he had given orders to the plaintiff as well as to other persons to do work upon the parcels of land.

Several witnesses were called, who stated (which, however, the defendant denied), that they had received orders from the defendant personally to do work or to supply materials upon or for the houses.

It was objected on behalf of defendant that this evidence was inadmissible; but the judge admitted the evidence, and the jury returned a verdict for the plaintiff.

The question for the Court was, whether the judge was right in admitting the evidence of witnesses in support of the plaintiff's case, with the object of shewing that the defendant had given orders to them with reference to work done or materials supplied in respect of the houses, the plaintiff not being present when any of the alleged orders were given.

Jelf, for the defendant. The evidence admitted by the judge shewed that the defendant had contracted with other tradesmen to do work upon the houses; it does not follow, because he employed them to do certain work, that he employed the plaintiff to perform the work for which the action is brought. The evidence raises a collateral issue, and is inadmissible. The question was, whether the defendant acted as owner of the houses, or held himself out as owner to the plaintiff; therefore, to make the evidence admissible, it must be shewn that the plaintiff knew that the defendant had given orders to the other tradesmen.

[LUSH, J. The issue in the cause was not so much to whom credit was given, as whether or not the defendant was the owner of the houses, or the real principal. If so, it does not signify whether the plaintiff knew of the orders having been given to the other tradesmen or not. The evidence tends to shew by the conduct of the defendant that he was the owner.]

All evidence on collateral facts ought to be excluded; here there is no connection between the question raised and the evidence. In *Hollingham* v. *Head* (1), the action was for goods sold and delivered; the defence, that the plaintiff had sold the goods to the defendant on certain terms, evidence of other sales by the plaintiff of goods of the same quality to other persons on the same terms was held to be inadmissible. That case was upheld in *Howard* v. *Sheward*. (2) In *Smith* v. *Wilkins* (3), the question being whether credit was given to defendant's wife, or to her father, evidence that other tradesmen had given credit to the father was rejected. *Barden* v. *De Keverberg* (4), is to the same effect. The law on this point is correctly laid down in Taylor on Evidence, s. 298, p. 333, 5th ed.

Gray, Q.C. (*Sawyer* with him), for the plaintiff, was not called upon.

MELLOR, J. We are all satisfied that the judge was right in receiving the evidence. It is argued that the evidence was collateral to the issue. No doubt in the cases referred to the evidence was collateral; but here the real question was, were the houses being built for the defendant, and were the goods supplied for him? It was, therefore, perfectly legitimate to shew that other tradesmen had supplied goods by the defendant's orders for the same houses. Had the evidence applied to other houses, the authorities might be in point against the admissibility of the evidence.

LUSH and HANNEN, JJ., concurred.

Judgment for the plaintiff.

Attorney for plaintiff: *T. W. Burr.*

Attorneys for defendant: *Clarke, Woodcock, & Ryland, for T. E. James, Gloucester.*

(1) 4 C. B. (N.S.) 388; 27 L. J. (C. P.) 241.
(2) Law Rep. 2 C. P. 148.
(3) 6 C. & P. 180.
(4) 2 M. & W. 61.

1870
Feb. 4.

[IN THE EXCHEQUER CHAMBER.]

TOLEMAN *v.* PORTBURY AND OTHERS.

Evidence—Burden of Proof—Forfeiture for Breach of Covenant—Covenant "not to permit a Sale by Public Auction on the Premises without Lessor's Consent."

The plaintiff demised a dwelling house to C., who covenanted not to permit a sale by public auction on the premises without the consent in writing of the plaintiff. C. underlet the premises to the defendant, and also assigned his goods upon the premises to three persons under a bill of sale; they sold the goods by public auction on the premises, bills being posted on the premises. In an ejectment for a forfeiture by a breach of the covenant, the above were all the facts proved, and the plaintiff was nonsuited:—

Held, that the nonsuit was right, by Kelly, C.B., Martin, and Pigott, BB., on the ground that there was no evidence that the sale was by the permission of the lessee; by Willes, J., and Cleasby, B., on the ground that there was no evidence that the sale had taken place without the consent of the plaintiff, and that the plaintiff was bound to give some evidence of this, though a negative; by Channell, B., and Brett, J., on both grounds.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to set aside a nonsuit and enter a verdict for the plaintiff.

Ejectment, on a forfeiture for breach of covenant, to recover possession of a dwelling house, No. 4, Sussex Terrace, Westbourne Grove, Bayswater. Of the six defendants, Reed, Aylett, Keed, and Artaud appeared and defended for the whole of the premises, but no appearance was entered by Portbury and Candler.

The particulars of breach of covenant for which ejectment was brought, were the permitting a sale by public auction to take place on the premises on the 23rd of May, 1867, without the consent in writing of the plaintiff first had and obtained, contrary to the covenant contained in the lease made between the plaintiff of the one part, and Candler of the other part, of the 23rd of March, 1860.

At the trial before Mellor, J., at the sittings in Middlesex in Easter Term, 1868, it was proved, that by indenture of lease of the 23rd of March, 1860, between the plaintiff of the one part, and the defendant Candler of the other part, the premises described in the writ were demised by the plaintiff to Candler, his executors,

administrators, and assigns, for twenty-one years from the 25th of March, 1860, at the yearly rent of 122*l.* 5*s.*

By the indenture of lease Candler, for himself, his heirs, executors, administrators, and assigns, covenanted with the plaintiff, that he would not permit any sale by public auction to take place on the premises without the consent in writing of the plaintiff. (1) The lease also contained a covenant by Candler not to assign or underlet the premises without the consent of the plaintiff; and also the usual proviso for re-entry on non-payment of rent, or in case of the breach of any of the covenants on the lessee's part contained.

On the 2nd of April, 1867, the plaintiff granted her consent to Candler to demise and lease or underlet to Reed, his executors, administrators, and assigns, the demised premises, for the term of fourteen years from the 25th of March, 1867, less three days; and on the 22nd of April, 1867, Candler, pursuant to the licence, demised by underlease the premises to Reed, by way of mortgage, to secure the sum of 300*l.*

On the 30th of April, 1867, Candler duly executed an assignment of all his goods and effects upon the premises to the defendants, Aylett, Keed, and Artaud. The other defendant, Portbury, was the occupier of a portion of the premises.

On the 23rd of May, 1867, one Edgeley, in partnership with the defendant Aylett as auctioneers and estate agents, sold, by public auction upon the premises, all the goods and effects, by the direction of the defendants Aylett, Keed, and Artaud; and previously to the sale bills announcing the same had been posted on the premises.

The respective counsel for the defendant Reed, and for the defendants Aylett, Keed, and Artaud, submitted that the plaintiff should be nonsuited, on the ground that she ought to have been examined as a witness to prove that she had not assented to the sale by public auction, and that there was no evidence of such sale having taken place without her consent, or that the defendant Reed or the lessee knew of, or permitted, the sale.

The judge directed a nonsuit, and reserved leave to move to enter a verdict for the plaintiff, with liberty to draw inferences.

(1) The above are the exact terms of the covenant as stated in the case.

1870

TOLEMAN v. PORTBURY.

A rule having been accordingly obtained, on the ground that there was evidence to go to the jury to prove a forfeiture of the lease,

May 5, 1869. *Montagu Chambers, Q.C.*, shewed cause on behalf of the defendant Reed.

Prentice, Q.C., shewed cause on behalf of the other defendants who had appeared.

They cited *Hobson* v. *Middleton*. (1)

No counsel appeared on behalf of the plaintiff.

MELLOR, J., was of opinion that the rule must be discharged. There was no evidence of any permission or consent to the sale or any act of the lessee; and, moreover, there was no evidence that the plaintiff, Mrs. Toleman, did not give her consent to the sale: she might have been called.

LUSH, J., was of the same opinion on the first point; and was also inclined to think that some negative evidence that the act was without consent of the lessor ought to have been given; but the other point was sufficient to sustain the nonsuit.

HANNEN, J., was of the same opinion on the first point; and was also of opinion that some affirmative evidence, though of a negative proposition, ought to have been given, that there had been no licence by the lessor, so as to prove the breach of covenant and the consequent forfeiture. Even on a breach of covenant to insure, it lay on the plaintiff to give some negative evidence; and in order to avoid the difficulty of proof, it was usual to insert in leases a clause that the lessee must produce the receipts for the insurance to the lessor.

HAYES, J., concurred.

The rule was accordingly discharged.

Afterwards, by a judge's order, the names of the defendants Aylett, Keed, and Artaud were struck out, and the defendant Reed alone appeared on the appeal.

(1) 6 B. & C. 295.

Feb. 4, 1870. *J. Brown, Q.C.*, for the plaintiff. The onus of proving that the plaintiff has consented to the sale being held on the premises lies on the defendant. The case is similar to proceedings instituted against a person for doing an act which he is not permitted to do unless qualified. For instance, in an action for penalties against the proprietor of a theatre for performing a drama without the consent of the author, the onus of proving consent lies on the defendant: *Morton* v. *Copeland.* (1) So, in a penal action against an apothecary for practising without a certificate, the defendant is bound to prove his qualification: *The Apothecaries Co.* v. *Bentley.* (2) So again, in the case of sporting without a licence, the same rule prevails: *Rex* v. *Turner.* (3)

[WILLES, J. In *Doe* v. *Whitehead* (4), it was decided that in ejectment on a forfeiture by breach of a covenant to insure, the omission to insure must be proved by the plaintiff. There is a distinction between an action for a forfeiture and an action for a penalty].

Assuming that it was incumbent on the plaintiff to give negative evidence, very slight evidence is sufficient, and the inference to be drawn from the facts is that such consent was not given.

Baylis (*Channell* with him), for the defendant. This is a case of forfeiture, and the plaintiff is endeavouring to divest an estate created by her own act. In the case of *Doe* v. *Whitehead* (5), Littledale, J., says, "where a landlord brings an action to defeat an estate granted to a lessee the onus of proof ought to lie on the plaintiff." In an action of ejectment the plaintiff must adduce evidence of all the facts necessary for recovery. In each of the cases which have been cited as to penalties, the qualification was in the defendant, and it was within his own knowledge whether he possessed it or not. The burden of proof was therefore on him. Here, whether the plaintiff gave her consent or not lies within her own knowledge, and it is for her to prove the negative. Secondly, the covenant is not to permit any sale by public auction to take place on the premises; that is a personal covenant, and must be construed strictly. The permission must relate to acts which the

(1) 16 C. B. 517; 24 L. J. (C.P.) 169.
(2) 2 Ry. & Mood. 189.
(3) 5 M. & S. 206.
(4) 8 Ad. & E. 571.
(5) 8 Ad. & E. 571, 576.

1870

TOLEMAN v. PORTBURY.

covenantor can control. Permitting an act to be done does not mean the same thing as being privy to it. The covenant must relate to such acts as the defendant could permit or forbid, and not to the acts of a stranger: *Hobson* v. *Middleton.* (1)

Brown, Q.C., in reply. Candler having been in possession for seven years, and not shewn to have gone out of possession, it is clear that the sale must have been with his knowledge and permission.

KELLY, C.B. I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. Sitting here in a court of error, I must not be supposed to hold that, if this covenant had been that no sale shall take place upon the premises without the licence in writing of the lessor, there would have been no evidence to leave to the jury upon which the plaintiff would have been entitled to recover. I express no opinion upon that point, because I do not think, taking the view that I do of the case, considered with respect to the whole of the evidence, that we are necessarily called upon to pronounce an opinion upon the question, whether, where an ejectment is brought for a forfeiture, said to have been incurred in consequence of a breach of a covenant of this nature,—a covenant not to permit a sale upon these premises, without the licence in writing of the lessor,—it is incumbent upon the lessor, the plaintiff, to shew there was not a licence, or upon the defendant, the lessee, or any one claiming under the lessee, to shew that there was a licence.

The covenant was that the lessee would not permit any sale by public auction to take place on the premises, without the consent in writing of the plaintiff. Whether there was or was not sufficient evidence of the want of consent in writing, it is quite clear to my mind that it is essential to constitute a breach of the covenant, that the sale should have been by the permission of the lessee; and looking at the whole of the evidence in this case, I am clearly of opinion that there was no evidence that this sale was by the permission of Candler, the lessee. I might, perhaps, have entertained that opinion, even if this had been an action of covenant; but being, as it is, an action for a forfeiture, and in

(1) 6 B. & C. 295.

which we must see that there is clear and sufficient evidence to be left to a jury that a forfeiture has actually been incurred, I think that the evidence is insufficient, and that the judge was perfectly right in nonsuiting the plaintiff.

Let us see what are the circumstances of the case. First, no actual permission de facto is proved, nor was there a particle of evidence pointing to such a conclusion, or from which we ought to infer that any permission was actually given. It appears that Candler was the lessee, but he had completely parted with the right to the possession of these premises by having underlet them to Reed. Subsequently, it appears, he had assigned the furniture and effects upon the premises to Aylett and other persons, and it appeared to be doubtful on the evidence whether he himself remained in actual possession of the premises. But if he did, and I will assume for a moment that there was some ground to presume, under all the circumstances of the case, that he was in actual possession and occupation of the premises, that is, that he continued to dwell in the house, it appears that he had assigned away the furniture and effects which were to be sold; and the question then arises, under all these circumstances, is there any evidence that he permitted this sale,—that it was by his permission, or under his authority? In the first place, he had no legal right to interfere with the assignees, or with the property, or with the sale of the property. He had no right to be upon the premises, and there is no evidence that he was there. But even if he were there, it is quite consistent with the evidence, that not only did he not permit the sale, but that he actually opposed it, and endeavoured to prevent it. But it is not necessary that we should go so far. It is quite enough for us to say that there is not a particle of evidence in the case that he either directly or indirectly authorized the sale. And when we look to the words of the covenant, we find that the lessee covenanted that he would not *permit* any sale. There is certainly no evidence that he had power to prevent it, and there is no evidence, in fact, that he did either directly or indirectly permit it.

On these grounds I think (even without looking at this case with the strictness which is required in a case of forfeiture), that as this act of sale was done without proof that the lessee had any

1870

TOLEMAN v. PORTBURY.

control over it, and there being no evidence that he had permitted the sale, the plaintiff was not entitled to recover.

My attention has been drawn by my Brother Willes to the case of *Attersoll* v. *Stevens* (1), which seems to point the other way. There there was a covenant by the lessee that he would not dig more than a certain quantity of brick earth upon the premises, and that if he did there should be an increased rent of 375*l.* per half acre, being after the same rate that the whole of the brick earth was sold for, and a stranger came in and dug a quantity of this brick earth, and the defendant, the covenantor, who was in possession of the premises, was held entitled to recover full damages, on the ground that although perhaps he could not prevent it, he would be liable for a breach of covenant. That turned upon the construction of the covenant, and not upon the question of the onus probandi; and moreover, that case was not a case of forfeiture, but merely a case of an action for damages against the wrongdoer. Therefore, the decision in that case is quite consistent with that which I now pronounce. Nor does the observation from Coke's 2nd Inst., 303, quoted by Mansfield, C.J. (2), that the lessee shall answer for the waste done by any stranger, point to a case of forfeiture.

I must therefore pronounce my opinion that there was no evidence which the judge could properly leave to the jury, that the sale was by the permission of the lessee; and that the judgment of the Court below should be affirmed.

MARTIN, B. I concur in the judgment of the Chief Baron.

WILLES, J. I rather concur upon the other ground. I do not mean in the least to make any observation on the Lord Chief Baron's judgment, or to say that I at all dissent from it; but I prefer putting my opinion upon the foundation of the law as laid down, more than thirty years ago, in *Doe* v. *Whitehead* (3), in which that most accurate lawyer, Littledale, J., pointed out the distinction between the cases relied upon by Mr. Brown, and the case of a forfeiture, where the lessor, the plaintiff, has the burthen of shewing that an estate which he has granted has been forfeited

(1) 1 Taunt. 183. (2) 1 Taunt. at p. 202.
(3) 8 Ad. & E. 571, 576.

1870

TOLEMAN v. PORTBURY.

by the tenant. In order to shew that, he must shew the act to have been done by the tenant, under circumstances in which it would be a forfeiture; and he does not shew that, by proving the sale by auction, without shewing that that sale by auction took place without the tenant's having obtained his, the landlord's, permission. The proof of the forfeiture is incomplete. The estate remains vested, until you shew that the circumstances occurred through which it is divested; and that burthen is not sustained by shewing circumstances in which it may be, or even probably is, divested, but in which also it may not be divested. Such, however, were the circumstances which were proved at the trial in this case.

CHANNELL, B. I am of opinion that the judgment of the Court of Queen's Bench must be affirmed. I agree that where there is an allegation in language which is negative, if that is traversed, the party who traverses the negative allegation has substantially the burthen of proof thrown upon him. But I do not think that rule applies to this case; nor is it like an action for penalties. I fully adopt the rule that where an estate is vested in the defendant by the act of the plaintiff, the plaintiff must shew that the defendant is divested of that estate, and when he seeks to rely upon a forfeiture, he must prove everything to shew that a forfeiture has taken place. I do not think, therefore, that the rule which has been deduced from actions for penalties, and other actions which might be instanced, applies to an action of ejectment for a forfeiture. But, even supposing Mr. Brown's contention on that point were right, I am clearly of opinion that there was no evidence that this act was an act done with the permission of the lessee.

PIGOTT, B. I agree with the judgment which the Lord Chief Baron has given. If it were necessary to decide the other point also, I should require time to consider it.

BRETT, J. I agree that in this case, which is an action of ejectment for a forfeiture, the plaintiff was bound not only to give evidence of the sale, but also that the sale took place by the permission of the lessee, and without the consent of the plaintiff.

1870

TOLEMAN v. PORTBURY.

CLEASBY, B. I am of the same opinion. I think there is little doubt about the proposition being true, that though it is a mere negative allegation which has to be proved, some evidence must be given. Now, what is the covenant here? It is, that the lessee will not permit a sale without a licence in writing. It involves two things,—a positive thing, permitting the sale; a negative thing, no consent in writing. Therefore, the plaintiff must give not only positive evidence of the sale, but also negative evidence of there being no consent in writing.

Judgment affirmed.

Attorney for plaintiff: *Reed.*
Attorney for defendant: *Ellerton.*

Feb. 14.

BERRY, APPELLANT; HENDERSON, RESPONDENT.

Pharmacy Act, 1868 (31 & 32 *Vict. c.* 121), *s.* 17—*Sale of "Poison"—"Medicine"—Bonâ fide compliance with proviso in s.* 17.

By s. 17 of the Pharmacy Act, 1868, it shall be unlawful (under certain penalties on conviction) to sell any poison, unless the box, vessel, &c., in which it is contained be distinctly labelled with the name of the article, and the word "poison," and with the name and address of the seller of the poison; it shall be unlawful to sell any of the poisons in the first part of sch. A. (prussic acid being one) to any person unknown to the seller, unless introduced by some person known to the seller; . . . but none of the provisions of this section shall "apply to any medicine supplied by a legally qualified apothecary to his patient, nor to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be labelled in manner aforesaid with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose."

The appellant, a person registered under the Act, was charged with contravening the enacting part of the section. It appeared at the hearing that J., a person unknown to the appellant, and not introduced by any person known to him, came into the appellant's shop, and asked to have a prescription made up, which was written, in pencil, in the usual style of medical prescriptions, and had "Mrs. Newton" at the bottom, as the person for whose use it was intended, and the initials "R. M. L.," which were the initials of a legally qualified medical practitioner. The appellant dispensed the prescription by putting two drachms of prussic acid into a 2 oz. bottle and filling it up with rose water, according to the meaning of the prescription; and the appellant copied the prescription into a book, in which he entered all the prescriptions he made up, with the name "Mrs. Newton." J. took the bottle,

1870

BERRY v. HENDERSON.

and paid the appellant's demand. The bottle was labelled with the name and address of the appellant distinctly written. The prescription was one that might be ordered for a lotion. There was no evidence whether there was or was not such a person as Mrs. Newton; but the appellant bonâ fide and reasonably believed that a medical man had prescribed the lotion for a Mrs. Newton, and that she was the person for whose use he was selling it:—

Held, that the medicine or lotion was a medicine within the meaning of the exception in s. 17, "of medicine dispensed by a registered person;" that the case was therefore taken out of the enacting part of the section as to poisons; that the appellant had complied with the proviso; and was, therefore, not liable to be convicted.

Semble, that there cannot be two separate convictions under different parts of the enactment for one and the same act.

CASE stated by Justices of Sussex under 20 & 21 Vict. c. 43.

An information was preferred under s. 17 of the Pharmacy Act, 1868 (31 & 32 Vict. c. 121), by the respondent, an inspector of police, against the appellant, a pharmaceutical chemist, duly registered under the Act, charging that the appellant, on the 11th of August, 1869, at Worthing, did unlawfully sell a certain poison of those which are in the first part of the schedule A. to the Pharmacy Act, 1868, to wit, prussic acid, to a certain person unknown to the seller, and not introduced by some person known to the seller, to wit, to one Ansell Johnson. (1)

(1) 31 & 32 Vict. c. 121, s. 17:—"It shall be unlawful to sell any poison, either by wholesale or by retail, unless the box, bottle, vessel, wrapper, or cover in which such poison is contained be distinctly labelled with the name of the article and the word poison, and with the name and address of the seller of the poison; and it shall be unlawful to sell any poison of those which are in the first part of schedule A. to this Act, or may hereafter be added thereto, under s. 2 of this Act, to any person unknown to the seller, unless introduced by some person known to the seller; and on every sale of any such article the seller shall, before delivery, make, or cause to be made, an entry in a book to be kept for that purpose, stating, in the form set forth in schedule F. to this Act, the date of the sale, the name and address of the purchaser, the name and quantity of the article sold, and the purpose for which it is stated by the purchaser to be required, to which entry the signature of the purchaser and of the person, if any, who introduced him shall be affixed; and any person selling poison otherwise than is herein provided shall, upon a summary conviction before two justices of the peace in England or the sheriff in Scotland, be liable to a penalty not exceeding 5*l.* for the first offence, and to a penalty not exceeding 10*l.* for the second or any subsequent offence, and for the purposes of this section the person on whose behalf any sale is made by any apprentice or servant shall be deemed to be the seller; but the provisions of this section, which are solely applicable to poisons in the first part of the schedule A. to this Act, or which require that the label

1870

BERRY v. HENDERSON.

The following facts were proved or admitted.

On the 11th of August, 1869, one Ansell Johnson, being a person unknown to the appellant, and not introduced to the appellant by any person known to him, came into the shop of the appellant, the appellant and his assistant being there, and asked to have made up a prescription, which was written in pencil, and is as follows:—"℞. acid. hydrocyan. Scheele's, ʒij, aq. rosæ, ʒij, m ft lotio ter die applic.—R. M. L. Mrs. Newton, Augt. 11th, 1869." The meaning of the name "Mrs. Newton" in the prescription was, that the prescription was for the use of Mrs. Newton. There is a legal qualified medical practitioner having the initials "R. M. L."

The appellant's assistant dispensed the prescription by putting two drachms of hydrocyanic acid into a two-ounce bottle, and filling up the bottle with rose water, according to the meaning of the prescription. The appellant made an entry in his prescription book, "Newton, Mrs.," and then copied the prescription verbatim. He also indexed the entry by inserting the name "Newton," and the page, in the index to the book. The prescription book is a book in which the appellant enters all prescriptions he makes up.

Johnson paid the appellant's claim, and took the bottle and its contents away.

The bottle was labelled as follows:—"Caution. For external use. The lotion to be used three times a day. Mrs. Newton. H. Berry, dispensing chemist, member of the pharmaceutical society, 58, Montague Street, Worthing."

Hydrocyanic acid (Scheele's) is prussic acid. The prescription is one that might be ordered for a lotion. Rose water, by itself, is not a medicine.

No evidence was given that there was or was not any such person

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shall contain the name and address of the seller, shall not apply to articles to be exported from Great Britain by wholesale dealers, nor to sales by wholesale to retail dealers in the ordinary course of wholesale dealing, nor shall any of the provisions of this section apply to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be labelled *in the manner aforesaid*, with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose; . . ."

as Mrs. Newton. Ansell Johnson, a witness for the prosecution, refused to answer the two questions: "Did he buy it for Mrs. Newton? Did he buy it for himself?" on the ground that by answering he might tend to criminate himself on a charge of attempting to commit suicide, on which he at the time stood remanded.

The Pharmacy Act, 1869 (32 & 33 Vict. c. 117), received the royal assent on the day of the alleged offence. (1)

The following points were raised on behalf of the appellant: That the appellant had not sold prussic acid pure and simple, but a mixture or compound of prussic acid and rose water. That that mixture was a medicine, and the prussic acid sold formed an ingredient of that medicine, and was therefore within the exception contained in s. 17 of the Pharmacy Act, 1868. That the name "Mrs. Newton" indicated the name of the person to whom the medicine was sold or delivered.

The following points were raised on behalf of the respondent: That the thing sold was not a medicine, but a poison partially diluted. That the name "Mrs. Newton" entered by the appellant was not the name of the person to whom the article was sold or delivered, but only the name of a person for whose use it was alleged to be required. That the book in which the entry was made was not a book kept for that purpose, inasmuch as it was kept for the purpose of copying therein prescriptions of all sorts.

The justices convicted the appellant of the said offence in a penalty of 10*s.*, and 1*l.* 1*s.* costs.

The questions of law are:—1. Whether a mixture of prussic acid and rose water is a poison within the meaning of s. 17 and of schedule A., part 1, of the Pharmacy Act, 1868. 2. Whether a mixture of prussic acid and rose water is a medicine within the meaning of s. 17. 3. Whether, according to the facts stated, the appellant complied with the requirements of the proviso at the end of s. 17. 4. Whether, according to the facts stated, the appellant had committed the offence with which he was charged.

There was another case stated, upon a second conviction of the appellant, on the same facts, for unlawfully selling poison without labelling the bottle "poison."

(1) See post, p. 300, n.

1870

BERRY v. HENDERSON.

Quain, Q.C. (with him *Bullock*), for the appellant. There are two convictions against the appellant on one and the same state of facts, for contravening different parts of the same enactment, 31 & 32 Vict. c. 121, s. 17, and one of the questions which will arise, if the convictions are upheld on the merits, is, whether there can be two convictions for one and the same act. The first conviction is for selling poison to a person unknown to the seller, and not introduced by a person known to him, and the other is for selling poison without having labelled the bottle "poison." But the question on the merits is the same, viz., whether this was a "medicine" dispensed by a registered person; and whether, if it was, the appellant brought himself within the proviso by what he had done. First, it is a medicine, though for external use, being, as it is found in the case, proper for a lotion. Secondly it is dispensed, that is, it is made up and sold across the counter with directions for use, by a person registered under the Act. Thirdly, was the bottle labelled "in manner aforesaid?" This means only "distinctly," with the name of the seller, as is shewn by 32 & 33 Vict. c. 117, s. 3 (1), which came into operation the very day this offence is alleged to have been committed; and it might be well contended that the conviction ought to be under that section. Then, has the appellant complied with the last part of the proviso? He has entered the ingredients in his book in which he enters all the prescriptions dispensed, and it was quite unnecessary that he should keep a book for the special purpose of entering those prescriptions only which contain poison. Lastly, he has entered the name of Mrs. Newton, as the person to whom he sold it. The words are, "sold or delivered," therefore it is sufficient to enter the name of the person for whom the prescription is prepared and sold, although delivered to a third person. As often as not, a prescription would be sent by a servant to be made up for the master or mistress; and the chemist has complied with the pro-

Ante 299

(1) 32 & 33 Vict. c. 117, s. 3:—"Nothing contained in s. 17 of the Pharmacy Act, 1868, shall apply to any medicine supplied by a legally qualified medical practitioner to his patient, or dispensed by any person registered under the said Act, provided such medicine be *distinctly* labelled with the name and address of the seller, and the ingredients thereof be entered with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose."

viso if he enters the name of the person which appears on the prescription as the patient. It is impossible for him to ascertain whether or not there is such a person as the person named in the prescription, he must give credit to the initials which he finds to the prescription. There is no doubt that the appellant acted in good faith; and it is not found in the case that he acted criminally nor even negligently.

Lumley Smith, for the respondent. It is most important that the present state of the law should be declared; it may, therefore, be conceded that the Act of 1869 (32 & 33 Vict. c. 117) had come into force, or, at all events, that s. 3 of that Act shews that "distinctly" is all that is to be understood by "in manner aforesaid," in s. 17 of the other Act. The appellant sold prussic acid, and therefore was selling poison, unless he can bring himself within the latter part of the section. What he sold was merely diluted poison, and not a medicine; rose water, it is found in the case, has no medicinal virtue whatever. No doubt there is a difficulty in saying a lotion is not a medicine, but then it must be something more than mere diluted prussic acid. Again, the appellant does not shew that this was a prescription written by a medical man, all that is found is that there is a medical practitioner with the initials "R. M. L." Nor is it shewn that there was such a person as Mrs. Newton.

[LUSH, J. Must we not take it that the appellant bonâ fide believed that this was a prescription for a lotion for Mrs. Newton?]

Bonâ fide belief can scarcely apply to a case of this sort; the chemist is liable to the penalties of this section, if the poison is sold by his apprentice or servant. The object of the section is to prevent and absolutely forbid the sale of poisons except with certain precautions. What was sold was a poison, and it lies on the appellant not only to shew that it was part of the ingredients of medicine, but of medicine for Mrs Newton, and that the prescription was really written by a qualified person.

[LUSH, J. It would impose a great difficulty in the way of chemists, if in such a case as this the chemist is bound to shew that a prescription which he has dispensed was really written by the physician whose initials it bears.]

To hold otherwise would open the door to the very dangers

1870

BERRY v. HENDERSON.

which the Act was intended to prevent. The chemist can always refuse to dispense any medicine containing a dangerous quantity of poison, unless the person asking for it is known to him or is introduced by a person known to him. Otherwise, a person wishing to commit suicide, or to use a poison for some other improper purpose, need only forge a false prescription and be supplied with it at once. In the next place, the name of Mrs. Newton entered in the book, was not the name of the person to whom it was sold or delivered. The object of the Act was to preserve evidence against the person who actually received the poisonous articles.

[HANNEN, J. Is that so; the section says the name of the person to whom it was *sold* or delivered.]

Supposing this to have been the sale of poison simply, the signature of the person receiving it would have had to be entered; so the person to whom the medicine is sold or delivered must mean the person actually receiving it.

[*Quain*, contrà. The signature required is the name of the purchaser.]

That must mean the person acting as purchaser, whether for himself or another; how can any one sign who is not present? In this case, therefore, the name of Johnson ought to have been entered in the book. Then, moreover, the book is the appellant's general prescription book, and not a book kept for the purpose of entering the sale of poisonous articles. There is no doubt that a separate book must be kept for the poisons pure and simple. With respect to the second case, precisely the same point arises, for the appellant was bound to label the bottle "poison," unless he brings himself within the exception.

[LUSH. J. The language of the section does not suggest to my mind that it was the intention to make a person liable to a double penalty for one act.]

The point is of little consequence, for the two convictions must stand or fall together.

Quain, Q.C., in reply.

[LUSH, J. The difficulty is that there is no finding upon the case, that the appellant could reasonably have believed that this was a prescription given to Mrs. Newton by a medical man, whose initials it purported to bear. It appears to have come to him in a

very loose shape,—a prescription, directing the composition of very poisonous ingredients, written in pencil, bearing initials which are not found to have been or to have appeared like the initials of the medical man whose name they were intended to represent. Supposing the appellant acted upon this prescription without the least inquiry, and handed the poisonous medicine over the counter, when he ought as a reasonable, prudent, man to have made inquiries, I can conceive that the conviction might be sustained, and the appellant not to have brought himself within the proviso. On the other hand, I can hardly think the proviso meant to cast upon every chemist the duty, at his peril, of ascertaining that the prescription presented is genuine. But it is obvious, I think, that every one who is entrusted with the sale of these poisonous things, is to take all reasonable care.

HANNEN, J. There is the same difficulty about the person to whom the appellant sold the medicine; there is no finding that there was such a person as Mrs. Newton, nor that the appellant believed there was such a person.

LUSH, J. It is impossible for us to answer the questions submitted to us one way or the other, without drawing inferences of fact, which, if it was intended the Court should draw, we must decline.

L. Smith intimated that the object of the prosecution was to obtain an enunciation of the law, and that the conviction of the appellant was of no importance.]

LUSH, J. We need not, then, hear Mr. Quain further. I should not be disposed to draw any inferences of fact; but assuming, under the circumstances, that we are to take the case as if the justices had found as a fact that the appellant did reasonably believe, when he was dispensing this prescription, that he was making up a prescription which had been actually given by a medical man to Mrs. Newton for a lotion, as it purported to be,—upon that hypothesis, I am of opinion that the appellant has brought himself within the proviso in s. 17. The first part of the section, the enacting part, applies to the sale of poisons, and amongst the poisons enumerated is prussic acid. I observe that the schedule seems to treat all the poisons as sold in their simple state, or in some form of preparation alone; and it does not appear to con-

1870

BERRY v. HENDERSON.

template any of them being mixed up with any other ingredients,—it applies to them pure and simple. But, taking the general sweeping words of the enactment alone, they would have prohibited any medical man, perhaps, from dispensing a prescription that contained a poison. In order to obviate that the proviso is inserted, which says that none of the provisions of this section shall "apply to any medicine supplied by a legally qualified apothecary to his patient, nor apply to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act." The first question is, was this mixture a medicine? This was scarcely disputed by the counsel for the respondent. The word "medicine" is comprehensive enough to include everything which is to be applied for the purpose of healing, whether externally or internally. According to the prescription, this mixture was intended to be used as a lotion, and the case states that it might properly be used as a lotion. The proviso seems to put upon the same footing a legally qualified practitioner supplying the thing to his patient, and a registered chemist dispensing such a thing. If a duly qualified medical man had directly supplied or delivered to his patient this compound of prussic acid and rose water, as a lotion, he would have been protected under the proviso; and we must apply the same rule to a registered chemist making up that compound from a prescription, which is what I understand to be involved in the word "dispensing,"—the making up something that is prescribed, and selling it with directions how it is to be used. Then, did this prussic acid form part of the ingredients of a medicine dispensed by a registered person? It did strike me at first, on reading the clause, that it applied only to cases where the poisonous article is one of several ingredients, so that perhaps its poisonous qualities are modified in a more or less degree by the other ingredients; but then I think, by giving that interpretation, we should make it very difficult to apply the Act. We cannot enter into the consideration whether the other ingredients of the mixture are fewer or more in number, or in what proportion they may be mixed. It is sufficient that this is a compound, and is a medicine which might have been prescribed by a medical man as a lotion. Then, has the appellant complied with the remaining part of the section, which requires that "the medicine be labelled in the

manner aforesaid,"—by which I understand "distinctly and legibly," —"with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose." It is found in the case that the ingredients were entered in what the appellant calls his prescription book, which, I think, satisfies the requirements of the Act, as "a book kept for the purpose," a book in which he enters all prescriptions which he makes up. Then he has entered "Mrs. Newton," as the person to whom it was sold. The statute, by saying the "name of the person to whom it is sold or delivered," has, I think, meant to give the option of putting down the name of the person to whom the medicine is actually delivered over the counter, or the name of the person for whose use it was intended, and whose agent the person actually receiving it across the counter is. Taking it to be found that the appellant reasonably believed that this lotion was duly prescribed for Mrs. Newton, Mrs. Newton must be taken to be the person to whom he sold it, and therefore he complied with the provisions of the Act. For these reasons I think that the conviction was wrong.

HANNEN, J. I am of the same opinion. I think we are able to pronounce our judgment at once, upon the assumption which has been agreed to, that it is to be taken that the justices have found that the appellant acted bonâ fide, believing Mrs. Newton was the person to whom the medicine was sold. Without that admission, I should have thought it necessary that there should be further inquiry; but by holding the appellant to have complied with the requirements of the proviso, upon the above assumption, I think we shall be putting a construction upon the Act which will not lead to the dangerous consequences which Mr. Lumley Smith has suggested; for it will only be where the chemist establishes that he has entered the name of the person to whom he delivered the medicine, or of the person to whom it shall be found as a fact that he has reasonably believed he had sold it, that he will succeed in bringing himself within the terms of this proviso.

Judgment for the appellant.

Attorneys for appellant: *Flux, Argles, & Rawlings.*
Attorney for respondent: *Willett.*

1870
Feb. 21.

TURNER *v.* CAMERON.

Landlord and Tenant—Distress—Fixtures—Railway connected with Coal Mine—Tram-plates and Sleepers embedded in Ballast.

Three railways were connected with a coal mine—one within the mine, one within a yard attached to the colliery, and the third extending from the yard and effecting a junction with a public railway. The lessee of the mine had mortgaged it to the plaintiff, who had entered into possession. The rent being in arrear, the lessor distrained, amongst other things, the three railways. The railways were constructed in the following manner:—The surface of the ground was prepared by having ballast spread upon it; sleepers were then embedded in the ballast and the ballast packed, and the rails were fastened to the sleepers by nails. In order to remove the rails, they were wrenched off the sleepers by means of bars and picks; and to remove the sleepers it was necessary to loosen the ballast by means of picks, and then with levers to raise them. The removal of the sleepers made holes in the ballast:—

Held, that the railways, by their mode of annexation to the soil, became fixtures, and were not distrainable.

Case stated by an arbitrator under an order of nisi prius.

This action was brought for breaking and entering a mine of the plaintiff, and amongst other things, seizing, severing, and carrying away rails, sleepers, railways, and tramways of the plaintiff, &c., and converting the same to the defendant's use.

Plea: Not guilty, by statute 11 Geo. 2, c. 19, s. 21.

The facts, so far as are material to the present report, are as follows.

N. Cameron, father of the defendant, by indenture demised to T. and J. Burge, for eighty-five years, certain mines of coal and other minerals, with the usual powers to work them, and also with power to use and construct all railways necessary for any purpose connected with the mines. In April, 1860, N. Cameron died, and the reversion in the premises demised vested in the defendant. By divers mesne assignments, and ultimately by a deed of December, 1861, the premises became vested in the Coalbrook and Broadoak Company, Limited, for the residue of the term of eighty-five years. By an indenture of May, 1865, certain alterations were made in the payment of the royalties reserved, and a power of distress was granted by the company to the defendant on nonpayment of the same. By an indenture of April, 1866,

the Coalbrook and Broadoak Company assigned to one O'Donoghue all the plant mentioned in a schedule annexed to the deed, and also demised to him for the term of fourteen years, from March, 1866, certain mines of coal and other minerals, being part of the mines and premises demised to T. and J. Burge by the first lease, with power to work the mines, and to use and construct railways for that purpose. The lessee covenanted that he would, within six months from the 25th of March, 1866, lay down and finish fit for traffic, and afterwards keep in repair, a railway upon the surface of the land in manner expressed in the lease. By an indenture of May, 1866, O'Donoghue mortgaged by sub-demise to the plaintiff the mines of coal and all other the premises comprised in the deed of April, 1866. Default having been made by O'Donoghue in payment of the mortgage money, the plaintiff, under a power contained in the mortgage deed, entered on the mine in October, 1867, and took possession of, amongst other things, the railways in and about and connected with the mine.

On the 6th of November, 1867, a half-year's rent which had become due to the defendant from the Coalbrook and Broadoak Company on the 29th of September, amounting to 600*l.*, being unpaid, the defendant distrained for the same, and took possession of and subsequently sold under such distress, amongst other things, the following: 1. A railway within the mine. 2. A railway within the yard; the yard was a piece of land fenced in by the first lessees and used for the purposes of the colliery. 3. A railway extending from the end of the yard through its length, and thence along the waste of a manor of the defendant to a junction with the Llanelly railway, and called the "new" railway, which had been constructed by O'Donoghue under his covenant.

These railways were subsequently taken up and removed by the purchasers.

The plaintiff contended that the distress was wholly illegal, for, amongst other reasons, that the railways were fixtures annexed to the soil, and not liable to distress.

The defendant contended that the railways distrained were distrainable chattels.

On the first argument of the case, the Court considered that the information before them was insufficient, and referred the case

1870

TURNER v. CAMERON.

back to the arbitrator, as to whether the sleepers and rails removed under the distress were or were not attached to the soil. He returned the following additional statement:—

1. Generally as to all the railways distrained. The mode of their construction was as follows:—The ground was brought to a dry and uniform surface by spreading thereon such hard and dry materials as the soil afforded; some further material of the same nature, such as broken stone and cinders, being brought from elsewhere, wherever the natural soil was moist or its surface depressed so as to require such aid to make it dry and level.

2. On the surface thus levelled the sleepers were laid, for the most part, transversely at equal distances.

3. The rails were then laid along the sleepers, and fastened to the surface of them by dog-nails, which are long and strong nails, either driven through holes in the rails prepared for that purpose, or made with a flat head projecting over the foot of the rail, and grasping it closely when hammered down, the sharp end of the nail being in either case driven into the sleeper as deeply as the wood would admit, and thus firmly fixing the nail thereto.

4. After these steps had been taken, large quantities of the above-mentioned dry and hard material, called "ballast," were brought along the line, and packed under and about the sleepers, with the twofold object: first, of keeping them dry, and thus preserving them from decay; and, secondly, of keeping them, by its support beneath and at the sides, in the position in which they had been placed.

5. The rails were clear of the ballast.

6. After the railways had been used for traffic the ballast packed under and about the sleepers became more solid than when first deposited; the sleepers also became more deeply imbedded in the ballast.

7. The rails and sleepers were thus removed:—The dog-nails were commonly wrenched out of the sleepers with a bar or pick, but in many cases the flattened head of the nails before mentioned was merely knocked aside when it did not pass through a hole in the rail, the rail being thereby released. Many of the nails were left sticking in the sleepers when the latter were removed. It

was impossible to ascertain the relative numbers of the rails detached from the sleepers in these different modes.

8. The rails, being thus set free, were carried off. Then the ballast about the sleepers was partly removed or loosened by a pick where they had become firmly imbedded, and next a lever or bar was driven under the sleeper through the remaining or loosened ballast (as the case might be), and by means of such lever or bar the sleeper was raised above and detached from the remaining ballast, so as to be easily carried away.

9. As to the railway in the mine:—The sleepers of this railway were all imbedded in the soil to the depth of two inches, and continued so at the time of the distress, with the exception of about 200 yards in length of the railway in the slant where the sleepers (which were here laid longitudinally) had recently been washed bare of ballast by the action of water running down the slant, and merely rested on the ground, being kept in position by stays—that is, pieces of wood driven between the wall or side of the pit and the sleepers. When this portion of sleepers and rails were removed there was no disturbance of the soil except a slight displacement of earth from the side of the pit arising from the removal of the wedges.

[10. The value was then given of this part of the rails in case any distinction were made by the Court.]

11. The railways in the yard had the sleepers completely imbedded in the ballast, such sleepers being from an inch and a half to two inches deep.

12. The third, or "new" railway, had sleepers of larger dimensions than the others. These sleepers were of the depth of $4\frac{1}{2}$ inches, and were laid transversely. In the centre, between the rails of this line, which was worked with horse-power, ballast was packed to a level with the tops of the sleepers in order to make a level surface for the horses to work on, the ballasting, continued to the line of the rails, packed about the sides of the sleepers, but with a decreasing depth of ballast towards the outside. The extreme ends of the sleepers were, for the most part, visible, but the sleepers were covered with ballast to their whole length in some places, and especially at the curves of the line. Some of these sleepers were round at the lower end, and some of them square.

1870

TURNER v. CAMERON.

13. As to all the railways, the hollow places left by the removal of the sleepers was distinctly visible, and in all of them, except in the denuded part of the slant above mentioned, some displacement of the ballast under and about the sides of them necessarily took place when they were removed—first, from the use of the pick and bar, as before stated; and, next, from the falling in of the ballast into the holes caused by the removal of the sleepers. Where the sleepers were round, such falling-in was considerable; where they were square it was to a less extent. The sleepers were, in general, round-bottomed, but no account was kept of the relative numbers of these respective shapes.

The question for the opinion of the Court was, whether the railways distrained by the defendant were legally distrainable.

Nov. 9, 16, 1869; and Jan. 18, 1870. *Giffard, Q.C.* (*J. W. Mellor* with him), for the plaintiff.

Grove, Q.C. (*Hughes* with him), for the defendant.

The arguments sufficiently appear from the judgment.

In addition to the cases mentioned in the judgment, the following cases were cited during the argument: *Climie* v. *Wood* (1); *Fisher* v. *Dixon* (2); *Cullwick* v. *Swindell* (3); *Boyd* v. *Shorrock* (4); *Dumergue* v. *Rumsey* (5); *Walmsley* v. *Milne* (6); *Ex parte Astbury.* (7)

Cur. adv. vult.

Feb. 21. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.) was delivered by

MELLOR, J. The only question not determined on the first argument in this special case was the liability of the railways therein described to be distrained for rent. (8)

The facts then stated by the arbitrator were not sufficient, in our opinion, for the satisfactory decision of that question; and we

(1) Law Rep. 3 Ex. 257; in error, Law Rep. 4 Ex. 328.

(2) 12 Cl. & F. 312.

(3) Law Rep. 3 Eq. 249.

(4) Law Rep. 5 Eq. 72.

(5) 2 H. & C. 775; 33 L. J. (Ex.) 88.

(6) 7 C. B. (N.S.) 115; 29 L. J. (C.P.) 97.

(7) Law Rep. 4 Ch. Ap. 630.

(8) The questions determined on the first argument were on the construction of the deeds mentioned in the special case, and do not require a report.

sent the case back for a further finding and statement of the exact mode in which these railways had been constructed, and how far, and in what manner, they were attached to the freehold. Upon the further statement of the arbitrator we are satisfied that the railways are not liable to be distrained for rent. [The judgment then set out at length the chief parts of paragraphs 1—8 of the additional statement.]

The railway called the "new railway" was fixed with sleepers of larger dimensions, and laid deeper in ballast, which was packed to a level with the tops of the sleepers, in order to make a level surface for the horses to work on.

In all the railways the removal of the sleepers caused hollow places and holes to be formed by the falling-in of the ballast; and wherever round sleepers were used, such falling-in was considerable.

The facts so found by the arbitrator appear to us satisfactorily to shew that the railways in question were not distrainable for rent, and that our judgment must therefore be for the plaintiff.

The question to be determined is, whether the rails and sleepers forming the railways under consideration continued to be personal chattels, or whether, by reason of their annexation to the freehold, as above described, they became fixtures.

The following is the definition of a fixture given in the treatise of Messrs. Amos and Ferrand, part 1, ch. i. p. 2: "It is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land and brought into contact with it: the definition requires something more than mere juxtaposition; as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented or otherwise fastened to some fabric previously attached to the ground."

In the present case we have not to consider the law which is applicable to fixtures as between the different descriptions of representatives of the same owner of the inheritance; neither have we to consider under what circumstances fixtures may be removed, either under express contract or in favour of trade, or what fixtures may be taken in execution under a writ of fieri facias; but the simple question is, did these railways, notwithstanding such annexa-

1870

TURNER v. CAMERON.

tion as is described in the case, retain the character of personal chattels; for if they did not, they were not liable to be distrained for rent. It is a general rule, that things adhering to the freehold cannot be taken under a distress for rent, the reason being, as stated by Chief Baron Gilbert, "that a distress was anciently no more than a pledge in the hands of the lord to compel the tenant to pay the service or perform the duty for which it was taken. . . . The nature of contracting by pawns or pledges is, that upon payment of the money for security whereof they were given, the pawn or pledge ought to be restored to the owner in the same plight and condition it was delivered . . . whatever is part of the freehold cannot be distrained, for what is part of the freehold cannot be severed from it without detriment to the thing itself in the removal. Consequently, that cannot be a pledge which cannot be restored in statu quo to the owner." (1) In determining whether the thing distrained is a personal chattel or a fixture it is important to consider "the mode of annexation to the soil or fabric, that is, whether it can easily be removed, integre, salve, et commode, without injury to itself or to the fabric of the building;" and in the next place, "whether it was for the permanent and substantial improvement of the freehold, . . . or merely for a temporary purpose, or the more complete enjoyment and use of it as a chattel:" per Parke, B., in *Hellawell* v. *Eastwood*. (2) We think that it must be taken as a fact that the railways in question were constructed for the better enjoyment of the colliery, and were so far permanent that they were intended to remain on the premises as ancillary to the working of the mines, at least until the expiration of the term; and were so constructed and fixed, not for the purpose of steadying them for "*their better use as chattels*," but as a substitute for the natural surface of the ground, along which it would have been impracticable to have worked the trains. It is expressly found by the arbitrator that they were so fixed and attached to the freehold, as not to be capable of being removed without considerable violence and wrenching by means of picks and iron bars, so that in their removal considerable holes were left in the surface by the falling in of the ballast material. The

(1) Gilbert on Distress, pp. 31, 38.
(2) 6 Ex. at p. 312; 20 L. J. (Ex.) at p. 160.

rails were wrenched from the sleepers by the use of similar instruments, leaving large nails sticking in the sleepers; and in "the new railway" the ballast was so placed and packed as to form a roadway for the horses drawing the trucks over the railway. Now this is a great deal more than "attaching" the railways "slightly so as to be capable of removal without the least injury to the surface or to themselves:" per Parke, B., in *Hellawell* v. *Eastwood.* (1) The argument in favour of the defendants mainly rested upon the decision of the Court of Exchequer in *Hellawell* v. *Eastwood* (2), and upon the judgment of the Lords Justices in *Duke of Beaufort* v. *Bates.* (3) The case of *Hellawell* v. *Eastwood* (2) has been frequently cited in support of propositions to which it was not applicable, but it has been recognized in this Court in *Waterfall* v. *Penistone* (4), and was referred to and distinguished in the judgments of this Court in *Longbottom* v. *Berry* (5), and contains, as it appears to us, a true exposition of the law as applicable to the particular facts upon which it proceeded. In that case the things distrained were mules, used for spinning cotton, fixed to the floor of a mill by screws, or let into stone and secured by molten lead; and Parke, B., in delivering the judgment of the Court, said (6), "they were attached slightly, so as to be capable of removal without the least injury to the fabric of the building, or to themselves, and the object and purpose of the annexation was not to improve the inheritance, but merely to render the *machines* steadier and more capable of *convenient use as chattels.*" Can this be said to describe the condition of the railways in the present case? On the contrary, the mules were more like the trams and trucks used on the railways in the present case than the railways themselves, which appear to us to have been more analogous to the floors of the mill. Mr. Grove's argument assumed that inasmuch as some of the ballasting material was brought from a distance to fill up the depressed places and to pack the sleepers, it did not become part of the soil or ground upon which it was placed. It does not appear

(1) 6 Ex. at p. 312; 20 L. J. (Ex.) at p. 160.
(2) 6 Ex. 295; 20 L. J. (Ex.) 154.
(3) 3 De G. F. & J. 381; 31 L. J. (Ch.) 481.
(4) 6 E. & B. 876; 26 L. J. (Q.B.) 100.
(5) Law Rep. 5 Q. B. at p. 137.
(6) 6 Ex. at pp. 312, 313; 20 L. J. (Ex.) 160.

1870

TURNER v. CAMERON.

to us to make any difference that the natural soil alone was used where the earth was dry and porous and afforded hard material, but additional material was combined with it where the conditions were different and the natural earth was moist.

14 Ch D 355

The case of the *Duke of Beaufort* v. *Bates* (1), which was referred to for some expressions of the Lords Justices, has no application to the present case. It turned upon the construction of covenants in a mining lease, and whether some tram-plates and sleepers, *merely laid upon the ground*, which had become indented by their mere user, were liable to be seized in execution as personal trade chattels. The execution creditor in that case having undertaken not to seize other tram-plates fastened to stone sleepers, the injunction, which had been granted by a Vice-Chancellor, was dissolved by the Lords Justices. The other cases which were cited in the argument (2) did not relate directly to the question in this case, but affected it incidentally only.

The result will be that judgment will be entered for the plaintiff for the sums assessed by the arbitrator with reference to all the railways in question as replaced in statu quo.

Judgment for the plaintiff.

Attorneys for plaintiff: *Clowes, Hickley, & Steward.*
Attorneys for defendant: *J. & W. Pontifex.*

Jan. 31.

MORIARTY AND WIFE *v.* THE LONDON, CHATHAM, AND DOVER RAILWAY COMPANY.

Evidence—Admission by Party to an Action that he has a bad Case—Admission by Conduct—Conspiracy to suborn False Evidence.

On the trial of an action by the plaintiff and wife for injuries sustained by the wife owing to the defendants' negligence, the plaintiffs' case was proved by the evidence of the wife and other witnesses; and, the defendants having called evidence to prove that the wife was in fault, tendered the following evidence, which was received, subject to objection. W. deposed that he, the plaintiff, and C., a clerk of the plaintiff's attorney, were together at the plaintiff's house; the plaintiff said that if W. would give evidence as to the accident he should share the compensation; the plaintiff knew that W. was not present at the accident, and W. said he was not, and C. said if W. would not come forward he, C., would get other wit-

(1) 3 De G. F. & J. 381; 31 L. J. (Ch.) 481. (2) See ante, p. 310.

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

nesses. Two other witnesses deposed to similar proposals made to them by C., but not in the plaintiff's presence, to give false evidence. The plaintiff was not present at the accident; and neither he nor C. had been called as witnesses:—

Held, that the evidence was rightly received, as amounting to evidence of an admission, by conduct, of the plaintiff that he had a bad case. C. having been shewn to be acting in concert with the plaintiff to suborn false witnesses, what C. did in furtherance of that object in the absence of the plaintiff might be inferred to have been done with the plaintiff's privity.

DECLARATION, by the plaintiff and wife, for injuries sustained by the wife while a passenger by a train of the defendants, owing to the defendants' negligence.

There was a second count by the plaintiff alone for the loss of the services of his wife, and for expenses he had been put to in curing her of the injury caused as aforesaid.

Plea: Not guilty. Issue thereon.

At the trial before Lush, J., at the sittings in London after Hilary Term, 1869, it appeared that the wife was a passenger by one of the defendants' trains on the night of the 28th of December, 1867, and that in getting out of the train at the Elephant and Castle station she was thrown down and injured, owing, as was alleged, to the train improperly moving on. The plaintiffs' case was proved by the evidence of the wife and other witnesses, among them one Dowle. The defendants called evidence to prove that it was the wife's own fault.

The following evidence was also admitted, after objection by the plaintiff. One Whymark deposed to the effect that at the Manor Arms, Walworth, the house of the plaintiff, who is a publican, he (Whymark), Moriarty (the plaintiff), one Cox, who was a clerk in the employ of the plaintiff's attorney, and Dowle, who was brother-in-law of Whymark, being together in a room there, the plaintiff said to Whymark, if Whymark would come forward and say that he had been in the train and witnessed the accident, he (the plaintiff) would willingly give one-third of the compensation that he received to Mr. Cox, and Whymark and Dowle. The plaintiff said he had spoken to Dowle, and that if Whymark would coincide with what Dowle said, he, Whymark, was to go and make a statement at Mr. Rose's (the attorney's) office; and this Whymark accordingly did, but afterwards communicated with the company. The witness added that the plaintiff knew

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

that he, the witness, was not present at the accident, but was in the plaintiff's house nearly the whole of the evening on which the accident occurred. The witness told Cox he was not at the accident. Cox said, "We can make a nice case about it, we have got a good medical man, and if you and I and Dowle keep it together we shall be able to make a nice little bit between the trio." Cox also said if the witness did not do it he would find others who would.

Two other witnesses, named Allen and Pitt, deposed to similar overtures having been made to them by Cox to give evidence at the trial, although he knew they were not present at the accident; but these overtures were not made in the presence of Moriarty.

Cox and Moriarty had not been called as witnesses, but they were called in reply, and contradicted all the evidence of the defendants' three witnesses.

The jury returned a verdict for the defendants.

A rule was afterwards obtained for a new trial on the ground of the misreception of the evidence of the defendants' three witnesses, and upon affidavits of surprise, and that the evidence of the three witnesses was not worthy of belief.

Nov. 23, 1869. *Huddleston, Q.C.*, and *J. C. Carter*, shewed cause. The evidence of Whymark was admissible, as contradicting or discrediting the witness Dowle; but it was also clearly admissible on the ground that he speaks to what the plaintiff himself did and said; and Cox, being shown by Whymark's evidence to have been acting in concert with the plaintiff, evidence of what Cox afterwards did in the absence of the plaintiff, but in furtherance of the common object, was also admissible as evidence against the plaintiff. The evidence shews a conspiracy on the part of Cox and the plaintiff to get a verdict against the company by false evidence. In *Lord Stafford's Case* (1), evidence was admitted on behalf of the accused to shew that Dugdale, a witness against the accused, had endeavoured to get people, and had offered money to them, to give false evidence against the accused.

[BLACKBURN, J. In that case the evidence went to discredit a witness who had been called, but here the defendants seek to give evidence against persons who were not called. The admission of

(1) 7 How. St. Tr. at p. 1400.

the evidence as to the prosecution by the defendant of the plaintiff for murder in the case of *Annesley* v. *Earl of Anglesea* (1) is more in point.]

The only real question is as to the evidence of Allen and Pitt; but Whymark's evidence goes to shew that the plaintiff was endeavouring to get false evidence, and on Whymark saying he was not present at the accident, Cox said if Whymark would not come forward he could get others who would; and what Cox afterwards did, according to Allen and Pitt, was only carrying out what he

(1) 17 How. St. Tr. 1139. This was a trial at bar in the Irish Court of Exchequer. It was an action of ejectment, the plaintiff claiming as son and heir of the defendant's elder brother. Evidence of the plaintiff's title having been given, it was proposed (p. 1217) to prove by John Giffard, an attorney, that the defendant, knowing the plaintiff claimed the estate, employed the attorney to prosecute the plaintiff for the murder of a man whom the plaintiff had shot by mere accident, as the defendant well knew, the defendant being in no way related to or acquainted with the person killed, and declaring that he would spend 10,000*l.* to get the plaintiff hanged, for then (as the witness afterwards added in giving his evidence), he (the defendant) would be easy in his title and estates. The ground for admitting the evidence was that the defendant's conduct shewed he was conscious of the goodness of the plaintiff's title, and distrusted his own. Bowes, C.B. (pp. 1220–1222), expressed his present opinion against the reception of the evidence, chiefly on the ground that the prosecution was not unlawful; but directed counsel to proceed with other evidence, in order that the Court might consider of the point before the next morning. Mounteney, B. (p. 1221), was strongly of opinion that the evidence was admissible on the ground that "every act done by the defendant, which has a tendency to shew a consciousness in him of title in the lessor of the plaintiff, must, he thought, be admitted, beyond all controversy, to be pertinent and legal evidence;" and he thought the evidence offered had that tendency, and was proper to be admitted. It was immaterial whether the act was lawful or not lawful, the question, which was for the jury, was, cui bono, and quo animo had the defendant taken up the prosecution. Dawson, B. (p. 1222) was of opinion with the Chief Baron, and agreed that it would be well to take the night to consider. On the next day (pp. 1223–1244), a discussion arose as to the admissibility of professional communications, but Dawson, B. (p. 1244) said he had considered the point of evidence that was proposed yesterday, and if it had now to be determined he should be of opinion to allow the evidence; and accordingly (pp. 1245–6), John Giffard gave the evidence, of which the substance has been given. In charging the jury, Bowes, C.B. (pp. 1415–16), Mounteney, B. (pp. 1426–9), and Dawson, B. (p. 1442), all left the evidence as to the prosecution to the jury for their consideration; quo animo it was done, and whether if they thought the evidence was true, the defendant's conduct amounted to an admission on his part of a consciousness that the lessor of the plaintiff was the lawful heir. The jury gave a verdict for the plaintiff.

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

had stated in the presence of the plaintiff he would do. Cox's conduct is therefore sufficiently connected with the plaintiff to make evidence of it admissible on that ground, although Cox had not been called. The resolution of the judges in *The Queen's Case* (1) will be relied on in support of the rule, but that was a criminal case. Lastly, there was ample evidence to justify a verdict for the defendants, without the evidence objected to; and if so, the Court will not grant a new trial for its misreception: *Doe* v. *Tyler* (2); *Horford* v. *Wilson.* (3) [They also argued that there had been no surprise.]

Jan. 29, 31. *H. S. Giffard, Q.C.*, and *Hodgson*, in support of the rule. The evidence of all three witnesses was inadmissible, neither the plaintiff nor Cox having been called as witnesses. This distinguishes at once *Lord Stafford's Case* (4), where the evidence was given to discredit a witness; this distinction is pointed out in *Attorney General* v. *Hitchcock.* (5) In *Annesley* v. *Earl of Anglesea* (6) the prosecution by the defendant of the plaintiff for murder was, from the first, part of the narrative of the relation between the parties; and, moreover, the question ultimately turned only on the admissibility of the evidence, as of a professional transaction between attorney and client. *The Queen's Case* (7) no doubt was a criminal case, and the first question to the judges was confined to a criminal case; but the reasons of the judges in answer,—that evidence shewing a person, not called as witness, but employed as an agent for the prosecutor to get up evidence, had offered bribes, was not admissible, unless it were shewn that the prosecutor, or some of the witnesses, were cognizant of the unlawful act,—apply just as much to a civil action.

[COCKBURN, C.J. The plaintiff was shewn to be present and taking part at the interview with Whymark; is it not an inference for the jury that Cox was acting by the plaintiff's authority in the other interviews?]

If the evidence be put, as in *Annesley* v. *Earl of Anglesea* (6), as evidence of an admission by conduct of the plaintiff, then the

(1) 2 B. & B. at p. 302.
(2) 6 Bing. 561.
(3) 1 Taunt. 12.
(4) 7 How. St. Tr. at p. 1400.
(5) 1 Ex. 91.
(6) 17 How. St. Tr. at p. 1217.
(7) 2 B. & B. at pp. 302, 306–7.

question of the plaintiff's conduct ought to have been left to the jury, as it was left in that case, quo animo the defendant had prosecuted the plaintiff; but the evidence was left simply as discrediting the story of the plaintiff's witnesses; the plaintiff's conduct was not left to the jury at all.

[BLACKBURN, J. The rule was not moved on the ground of misdirection.]

It is also to be observed that the plaintiff is the mere nominal plaintiff. [They also argued that there ought to be a new trial on the ground of surprise.]

COCKBURN, C.J. I think this rule ought to be discharged, so far as the ground taken that the evidence was improperly admitted. I think it was rightly admitted. The conduct of a party to a cause may be of the highest importance in determining whether the cause of action in which he is plaintiff, or the ground of defence, if he is defendant, is honest and just; just as it is evidence against a prisoner that he has said one thing at one time and another at another, as shewing that the recourse to falsehood leads fairly to an inference of guilt. Anything from which such an inference can be drawn is cogent and important evidence with a view to the issue. So, if you can shew that a plaintiff has been suborning false testimony, and has endeavoured to have recourse to perjury, it is strong evidence that he knew perfectly well his cause was an unrighteous one. I do not say that it is conclusive; I fully agree that it should be put to the jury, with the intimation that it does not always follow, because a man, not sure he shall be able to succeed by righteous means, has recourse to means of a different character, that that which he desires, namely, the gaining of the victory, is not his due, or that he has not good ground for believing that justice entitles him to it. It does not necessarily follow that he has not a good cause of action, any more than a prisoner's making a false statement to increase his appearance of innocence is necessarily a proof of his guilt; but it is always evidence which ought to be submitted to the consideration of the tribunal which has to judge of the facts; and therefore I think that the evidence was admissible, inasmuch as it went to shew that the plaintiff thought he had a bad case. It is to be

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

observed, that the plaintiff is not the nominal plaintiff merely, but the substantial plaintiff in the sense that the damages would have gone into his pocket; and the question is not whether the evidence is true, but whether it was admissible. The plaintiff is shewn to have been taking an active part with Cox, who was acting in a certain sense as clerk to the plaintiff's attorney, and was endeavouring to suborn witnesses. And when, after that, the same Cox is shewn to have solicited other witnesses to commit perjury, although the plaintiff was not present at those solicitations, yet I think there was evidence to go to the jury that what Cox then did was done in furtherance of an object which was common to him and the plaintiff, and that he was acting on the authority of the plaintiff. I think there was evidence of a conspiracy between Moriarty and Cox to suborn testimony, either to set up a false case, or by false evidence to bolster up what might be a fair one; at all events, there was matter which was very properly left to the jury; and I think this rule ought not to be made absolute on the ground that the evidence was improperly received.

I have some doubt whether there is a case of surprise. But this is a case in which one would desire that the evidence should be thoroughly sifted. For anything that can be shewn to impugn the veracity of witnesses, who come forward at the last moment to set up a case of conspiracy to suborn false testimony, should be investigated to the utmost. I think, therefore, on the ground that this evidence may be further investigated and sifted, we should make the rule absolute; but it must be on payment of the costs of the first trial.

BLACKBURN, J. I am of the same opinion. On the first question, as to admissibility of the evidence, I quite agree that the evidence of both Allen and Pitt, as well as of Whymark, was admissible. What the plaintiff on the record has said, is always evidence against him, its weight being more or less. Even if the plaintiff is merely a nominal plaintiff, a bare trustee for another, though slight in such a case, still it would be admissible. Here, however, the husband is not only plaintiff on the record, but would have the benefit of the whole cause. It is quite true that

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

he was not present when the accident took place, and what he knows about the nature of the accident, and as to whether or not his wife was injured in the way she says, or whether or not the story of the defendants is untrue, would only be on information and belief. But if the defendants had got hold of a letter written by Mr. Moriarty, in which he had said, "I am carrying on this action for my wife; but though I was not present, yet from information my belief is we shall fail utterly, and we must get false evidence to support the case," I think no one could contend—and Mr. Giffard admitted he could not contend—that that would not be evidence to go to the jury as an admission on the part of Moriarty, not in any way conclusive, because he might make a mistake, but evidence to go to the jury with its proper weight, care being taken to caution the jury not to give it too much weight.

The question then arises, whether or not, where there is evidence that the plaintiff tried to suborn witnesses to swear what was to his knowledge false, the jury could draw exactly the same conclusion as if a letter like that supposed had been put in. It seems to me that, in common sense, the inference would be very strong that he acted as he did because he was very doubtful about his case, not necessarily that he thought his case untrue, but that it was not a good one. As to the authorities, the cases bearing on the point as far as I can ascertain, and the text-books, all go to shew, more or less, that evidence as to conduct is admissible evidence; but I think there is no case or authority in which the present point was actually ruled, except the celebrated case of *Annesley* v. *Earl of Anglesea* (1), in which I think it was distinctly ruled. Mr. Giffard was right as to what occurred after the evidence was tendered on the first day. There was a difference of opinion among the judges as to whether it ought to be admitted, and the Chief Baron thought it should not, his objection in substance being, that it would lead to a long collateral inquiry as to whether or not the prosecution was with reasonable and probable cause. Mounteney, B., was very strong for admitting the evidence, and Dawson, B., said, "I am very glad there is no necessity for giving our opinions immediately on this point. I shall, therefore, decline giving any positive opinion, as we have this night to consider of it, and in the mean-

(1) 17 How. St. Tr. at p. 1223.

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

time the gentlemen on both sides might look into the cases to clear it up to the Court. The prosecution here is agreed to be a lawful act, and is not immediately relative to the matter in issue. The difficulty with me is, if this be given in evidence, a jury may, from a lawful act not immediately relative to the issue, draw an unwarrantable consequence. If the act were unlawful it would undoubtedly be good evidence, there could be no other way of accounting for the party subjecting himself to legal punishment; but where it is not unlawful, it may be injurious to leave the intent to the jury. We will consider of this matter and give our opinions on it to-morrow." (1) On the morrow, as Mr. Giffard truly said, a great deal of matter was brought forward which involved the question whether a professional witness's evidence could or could not be admitted. It is decided that it can; but Dawson, B., adds: "I think it proper at this time to mention that I have considered the point of evidence that was proposed yesterday, and if it was now to be determined, I should be of opinion to allow the evidence, and if the counsel for the defendant should so please, they may take a bill of exceptions." (2) After that the evidence is given.

The strong way in which in the course of the argument, and in charging the jury, Mounteney, B. puts it as a question for them, whether the prosecution by the defendant of an innocent man for murder be not an admission on the part of the defendant of title in the plaintiff, and whether that would not go far to discredit the defendant's witnesses, has great weight in principle; and that principle applies to Whymark's evidence, who swears that Moriarty was present and took part when there was this effort to procure him to give false evidence. But Whymark's evidence goes further than that; he says, at that time Cox said if Whymark would come and join, it would be a good case, and if he would not, he, Cox, would get other witnesses to swear falsely; and this, as I understand, was said to have taken place in Moriarty's presence. That may be all false or not, but that was for the jury to say, and if it is believed, I think there is sufficient to shew concert between Moriarty and Cox to get such false evidence as might be necessary, from what had been done by the express authority of Moriarty;

(1) 17 How. St. Tr. 1220, 1222. (2) See 17 How. St. Tr. 1244.

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

and that if they were on their trial for conspiracy, the evidence of what Cox did, in the absence of Moriarty, would be evidence for the jury of facts done in furtherance of the conspiracy. Still the jury might disbelieve the evidence altogether, or they might reject the evidence on the ground that, in their opinion, Cox was not acting with Moriarty's authority. I do not wish to express any opinion, one way or the other, as to what would have been the case, if a person who had the sole conduct of the cause had suborned false witnesses,—whether the evidence, as shewing an unlawful act, would be admissible or not. I doubt very much a great deal of what the witnesses said; but the point at present is, was the evidence admissible? I think it was, and I have no doubt it went to the jury with a proper direction to them. I quite agree that the jury should be cautioned about giving it too much weight, which would possibly be the error of the jury; and that you are not to punish a man by taking away his right of action merely for getting false testimony, but only to see whether it shakes your belief in the evidence on his side. But, no doubt, a proper direction was given by my learned Brother; and no motion has been made for misdirection.

As to the affidavits, I hardly think they make out a case of surprise; but I agree with my Lord that the matter is such that it ought to be investigated again; and consequently, there ought to be a new trial on payment of costs.

LUSH, J. I also think, on further consideration, the evidence was receivable. I had formed no definite opinion on the subject at the trial. It was a new point, and I adopted what I considered to be the usual and the safer course, where evidence is pressed by one party and objected to by the other, not having formed a strong opinion one way or the other, of receiving the evidence at the peril of the party presenting it. The argument the plaintiff has laid before us has led me to consider the matter, and I am quite satisfied, with the rest of the Court, that this species of evidence is receivable, as evidence of an admission by the party against whom it is given that the case he was putting forward was not a true one. It was an admission by conduct, and receivable on that ground. The effect of the evidence is entirely for the jury. No

1870

MORIARTY v. LONDON, CHATHAM, AND DOVER RAILWAY CO.

doubt there are cases, perhaps it frequently happens, in which a person has endeavoured to bolster up a good case by fictitious evidence. That goes to a consideration of its weight, and that should be pointed out to the jury; it is a matter entirely for them.

I also think that no distinction can be made with reference to the character of the party suing; whether it is a representative character, or he is suing to enforce some right of his own. Either way, the inference which the evidence tends to raise is the same, that the case is not a true one, and on that ground the evidence is receivable.

I entirely agree that it is fit, looking at the character and conduct of these witnesses, that the case should undergo further examination; and that the rule, therefore, should be made absolute on payment of costs.

Rule accordingly.

Attorney for plaintiffs: *J. A. Rose.*
Attorney for defendants: *Cleather.*

END OF HILARY TERM, 1870.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXXIII VICTORIA.

THE QUEEN, ON THE PROSECUTION OF THE GUARDIANS OF THE STEPNEY UNION, RESPONDENTS; *v.* THE GUARDIANS OF THE WHITBY UNION, APPELLANTS. 1870 *April* 27.

Poor—Pauper Lunatic—Removal—Irremoveability by Residence—Break of Residence—Removal of Pauper while Insane—9 & 10 *Vict. c.* 66, *s.* 1; 16 & 17 *Vict. c.* 97, *ss.* 97, 102—*Practice, on Case from Quarter Sessions.*

J.P.B. 34
26 B.D. 5

E. M., a single woman, aged 28, having resided in the R. union as a domestic servant more than a year, was suddenly seized with mania on the 16th of September; the next day her mother fetched her away from her master's house (he paying the wages up to that day), and took her to her parents' residence in the S. union. She remained with her parents one night, and the next day was taken to the S. union-house; and on the 26th of September she was sent to the county lunatic asylum as a pauper lunatic, where she still remained, having continued insane from her first seizure. E. M.'s settlement was in the W. union:—

Held, that the order for her maintenance, under 16 & 17 Vict. c. 97, ss. 97, 102, ought to be on the R. union and not on the W. union; for that the lunatic, having acquired a status of irremoveability by a year's residence in R., her mere bodily removal, while she was unable to exercise any will of her own, was no break of the residence.

A case from quarter sessions comes before the Court of Queen's Bench on a rule to quash the order of sessions, and the party supporting the order of sessions, therefore, begins by shewing cause against the rule to quash.

UPON an appeal against an order of justices of the 23rd of October, 1868, whereby the settlement of Esther Marshall, a pauper

1870

THE QUEEN v. WHITBY.

lunatic, was adjudged to be in the township of Whitby in the Whitby Union, and the guardians of that union were ordered to pay the expenses of her removal to a lunatic asylum, and her maintenance therein, the quarter sessions confirmed the order, subject to the following case.

Esther Marshall is a single woman, aged 28, settled in the township of Whitby, in the Whitby Union. For one year and three months immediately preceding the 17th of September, 1868, she had been a domestic servant, in service at Richmond, in the Richmond Union, as a yearly servant, and had during such period resided and slept at the house of her master in Richmond.

On the night of the 16th of September, 1868, she was seized with a severe attack of mania, and her master thereupon went to the workhouse of the union, and requested that she might be removed to the workhouse to be taken care of. The master of the workhouse stated that he could not interfere, as Esther Marshall was still residing in her master's house.

The next morning, the 17th of September, her master applied to the board of guardians of the union, but they stated that they had no power to interfere in any way, and the master then telegraphed to the parents of the lunatic, who were residing at Ratcliff, in the Stepney Union, a distance of about fourteen miles, to come to Richmond to remove her. In the afternoon of the same day her mother and her brother arrived at Richmond. The master thereupon paid the mother her daughter's wages up to that day, and, having hired a fly, Esther Marshall was removed in it by her relations from the residence of her master at Richmond to the residence of her parents at Ratcliff. The master had not any intention or expectation of receiving Esther Marshall back again into his house.

Esther Marshall remained at the home of her parents (who were poor persons, and in receipt of outdoor parochial relief from the township of Whitby) one night only, during which time she attempted to throw herself out of the window. The next morning (the 18th of September) the parents applied to the relieving officer of the Stepney Union, who had the lunatic removed in due course on the same day to the workhouse of that union. She remained in the workhouse for seven days, and was sent to the

lunatic asylum for the county of Middlesex on the 26th of September, where she has since been confined as a pauper lunatic, having remained insane from the night of the 16th of September.

On the 23rd of October, 1868, the order appealed against was made.

Esther Marshall had on the 16th of September, 1868, acquired the status of irremoveability from the Richmond Union under 9 & 10 Vict. c. 66, s. 1, 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8, by virtue of residence therein for more than a year.

It was contended on behalf of the appellants that as Esther Marshall had on the 16th of September acquired a status of irremoveability by residence in the Richmond Union, the order for her past and future maintenance ought not to have been made upon the guardians of the place of her settlement, but ought to have been made upon the guardians of the Richmond Union under 16 & 17 Vict. c. 97, s. 102; and it was further contended that her removal under the circumstances mentioned did not constitute a break of her residence in Richmond so as to destroy her status of irremoveability.

It was contended on behalf of the respondents that the order was rightly made on the guardians of the place of settlement; and that the removal of Esther Marshall under the circumstances mentioned did constitute a break of residence so as to destroy her status of irremoveability.

The question for the Court was, whether the guardians of the Stepney Union were prevented from obtaining an order on the guardians of the Whitby Union for the maintenance of Esther Marshall, under 16 & 17 Vict. c. 97, s. 97.

G. Tayler, for the respondents. (1) The order was rightly made on the Whitby Union, wherein the parish of settlement is, under

(1) *Poland*, for the appellants, asked the direction of the Court as to which party were to begin, as it had been understood the Court had intimated that the appellant was to begin in *all* cases.

But, per Curiam, a case from quarter sessions comes before the Court on a rule to quash the order of sessions, the party, therefore, who supports the order of sessions begins by shewing cause against the rule to quash.

The quarter sessions having confirmed the order appealed against, *G. Tayler*, for the respondents, accordingly began.

1870

THE QUEEN v. WHITBY.

16 & 17 Vict. c. 97, s. 97. The appellants contend that it ought to have been made under s. 102, on the Richmond Union, where, they contend, the lunatic had acquired a status of irremoveability by more than one year's residence, under 9 & 10 Vict. c. 66, s. 1, 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8. But, the pauper had ceased to reside in the Richmond Union before the order was made. In *Reg.* v. *Whissendine* (1), it was held that a pauper, who had acquired a settlement by residing on an estate in W., but had been removed by his relatives to a distant lunatic asylum, had lost his settlement under 4 & 5 Wm. 4, c. 76, s. 68, by reason of his having "ceased to inhabit."

[BLACKBURN, J. In that case, the pauper had been several years in the asylum.]

It is immaterial how long the break has lasted; the argument for the appellants must be the same if the lunatic had remained with the parents a year instead of only a day. Moreover, there must be an intention to return and a place of residence to return to: *Reg.* v. *Glossop.* (2) Here the master had put an end to the service, and did not intend to receive the lunatic back; she was not absent, merely for a temporary purpose, as in *Leeds* v. *Wakefield.* (3)

[MELLOR, J., referred to 12 & 13 Vict c. 103, s. 4, which enacts that the removal of a lunatic to an asylum, under the authority of the statutes, is not to be deemed an interruption of his residence.

BLACKBURN, J., referred to *Reg.* v. *St. Leonard, Shoreditch.* (4)]

In that case the pauper, though she slept out of the parish for several nights, was actually in the parish during the day, so that she had never ceased to reside. Or, at all events, there was an actual return to the parish of irremoveability.

[BLACKBURN, J. The question is whether the residence has ever ceased, the absence being involuntary; actual return would not restore it if once broken.]

Here there is an actual absence, and when that is the case there is a break, unless the intention to return be shewn: *Reg.* v. *Tacolnestone* (5); *Reg.* v. *Stapleton* (6); *Reg.* v. *Brighton.* (7) The

(1) 2 Q. B. 450.
(2) Law Rep. 1 Q. B. 227.
(3) 7 E. & B. 258; 26 L. J. (M.C.) 37. 3 Jur. N.S. 292.
(4) Law Rep. 1 Q. B. 21.
(5) 12 Q. B. 157; 18 L. J. (M.C.) 44.
(6) 1 E. & B. 766; 22 L. J. (M.C.) 102. 17 Jur. 549
(7) 1 E. & B. 236; 24 L. J. (M.C.) 41. 1 Jur. N.S. 138.

pauper being lunatic, her mother being, as it were, the natural guardian, is capable of exercising a choice for her, and therefore the removal by the mother is a change of residence by the pauper.

Poland, and *Poynter*, for the appellants. The statutes, under which the status of irremoveability is acquired, were passed for the benefit of the pauper, and not with any regard to the rights of parishes inter se. Here the lunatic having acquired that status, it is for those who contest the irremoveability to shew that it has been lost. Has the lunatic here done anything to lose it? If there had been a removal of a pauper under legal process, the removal, for however short an interval, broke the residence: *Reg.* v. *Halifax* (1); *Reg.* v. *Seend.* (2) And 12 & 13 Vict. c. 103, s. 4, was passed to cure the hardship which would arise when the lunatic had been removed by authority of the statutes; and by that enactment such residence in a lunatic asylum is excluded for all purposes, as in the case of imprisonment: *Reg.* v. *Hartfield* (3); *Reg.* v. *St. Andrew, Holborn.* (4) But here the removal from Richmond though actual, was purely involuntary, and is no more the act of the lunatic herself than if she had met with an accident and had been carried in a state of insensibility to a hospital out of the parish. Non constat, if she had recovered her senses, she would not have returned immediately to Richmond. It is true the master, whether rightfully or wrongfully, has put an end to the service, and did not intend to receive her back into his house; but, though he put her out of his house, he had no power to remove her from the parish. Neither had the mother any such right. The parents are natural guardians, but except under the statute of Elizabeth, they have no rights or liabilities when the child is of age; relief to a child over sixteen, is not relief to the parent: *Reg.* v. *St. Mary, Islington.* (5) Moreover, here the parents were themselves in receipt of parish relief. If this involuntary removal be a break in the residence, it would have been a break had the lunatic recovered her senses and returned the next day; and, the residence once broken, the right cannot be reacquired. *Rex* v.

(1) 12 Q. B. 111; 17 L. J. (M.C.) 158.
(2) 12 Q. B. 133; 18 L. J. (M.C.) 12.
(3) 17 Q. B. 746; 21 L. J. (M.C.) 65.
(4) 17 Q. B. 746; 21 L. J. (M.C.) 69.
(5) 3 B. & S. 46; 31 L. J. (M.C.) 233.

1870

THE QUEEN v. WHITBY.

Sutton (1), is very much in point; there a yearly servant became lunatic forty days before the end of the year, and was taken home by his father to another parish, but it was held that the servant had acquired a settlement in the master's parish by service for a year, notwithstanding this absence for twenty days. So in the case of absence of the servant through illness with an intention of returning: *Rex* v. *Islip.* (2) It would be otherwise, if the dissolution of the service were voluntary on the part of the servant: *Rex* v. *Sudbrooke.* (3)

9 QB 343

BLACKBURN, J. I am of opinion that the order of sessions and the order of removal must be quashed. Under the Lunacy Act, 16 & 17 Vict. c. 97, s. 97, when a pauper lunatic is in an asylum his place of settlement must be ascertained, and an order of justices obtained for the costs of his maintenance on the parish of settlement; but, by s. 102, if the lunatic had at the time of his removal to the asylum, acquired a status of irremoveability, the order is to be on the parish in which that status has been acquired. The question, therefore, comes to be whether this woman, at the time she was conveyed to the asylum, had become exempt from removal on the ground that she had resided for more than a year in Richmond; if she had, the order ought not to have been made on her parish of settlement. I think she had acquired the status of irremoveability from Richmond by her residence there, and has not lost it by what occurred on her becoming insane. It must be remembered that the statute 9 & 10 Vict. c. 66, was intended for the benefit of the pauper; not to give either parish an advantage, but to relieve poor persons from the extreme hardship of being removed from the neighbourhood in which they had acquired friends, to a distant place where very possibly they were absolute strangers. How then, if the status has been acquired, does it cease? Clearly, when the person ceases to reside in the parish. What is cessation of residence must depend upon circumstances; and when the necessary length of residence is shewn, the onus is on the side contesting the irremoveability to shew that it has been lost. And this is shewn when a person who has a right and power

(1) 5 T. R. 657. (2) 1 Str. 423.
(3) 4 East. 356.

1870

THE QUEEN v. WHITBY.

to choose, exercises the choice and goes out of the parish; and if he goes, primâ facie the status is lost; but it may be shewn in answer that when he went out of the parish he had an intention to return, and this would rebut the presumption and shew the status is not lost. But in the present case the pauper is insane, and when physically removed from the parish, had no intention one way or the other,—no intention to change her place of residence and no intention to keep it, being incapable of using any choice in the matter; that being so, there is nothing to shew a change of residence at the time she was conveyed to the asylum, and the bare fact that at that time she had been carried across the border of the parish is perfectly immaterial. I do not say that in no case could a lunatic lose his status of irremoveability acquired at the time he became insane. Supposing a regular guardian or committee to have been appointed by the Court of Chancery, I should be inclined to think such a guardian might be capable of exercising a choice in the change of residence so as to bind the lunatic; or, perhaps, after a long time, the guardian de facto might do the same, as an executor de son tort may in some cases bind the deceased's estate. But there is no such case here. The mere relationship between the mother and the pauper cannot affect the question; and though I should think the mother, being herself in receipt of relief, took the daughter home with her merely in order to get her taken care of by the parish and removed to a lunatic asylum, yet, even if her first intention was to keep her daughter at her own house, she had no authority or power to exercise a choice for the lunatic, and therefore the fact that the daughter was taken to her parent's house in another parish could not change her residence. Mr. Poland put his argument on the right ground, when he suggested that supposing the pauper to have recovered her senses, and come back, there would have been no break of residence, because there had been no intention on her part to change her residence, and there was no person who had authority to act for her, and the residence therefore must be supposed to continue. In the present case the lunatic has no interest in the matter; but as the statute says the expenses shall fall on the parish from which the lunatic is irremoveable, we must look at the question just as if the pauper herself were interested. The

1870

THE QUEEN v. WHITBY.

order of sessions and the order of justices must, therefore, be quashed.

MELLOR, J. I am of the same opinion. The case does not depend on circumstances which might affect the condition of the lunatic; but still, in interpreting the statute, we must look at the intention and object, which was to prevent the oppression which the law of removal caused to poor persons by removing them from the associations which they had formed, and removing them to a place with which they possibly had no other connection than that a grandfather or grandmother had been born or settled there. There is nothing in the argument as to the master breaking and putting an end to the contract; it is to be observed that he only paid the wages up to the day of leaving; whereas properly to determine the contract, a month's wages or a month's warning would have been necessary. But, even assuming the master, under the circumstances, was justified in discharging the lunatic at once; by so doing he could only put her out of his house, and, as Mr. Poland rightly observed, this would not necessarily put her out of the parish; she would have remained in the parish had not her mother removed her. But when the status of irremoveability has been once acquired, in general some act of the pauper's own ought to be shewn before the status can be put an end to. Now it is true there was an actual bodily removal, and the fact of the mother, being as it were, her natural guardian, made me doubt at first whether the residence had not been broken; but I am now satisfied that it was not; there was nothing to have prevented the pauper, had she recovered her senses, from resuming her residence unbroken; and it lay on those who contest the irremoveability, to shew that the residence was substantially broken, which, as my Brother Blackburn pointed out, is a question of intention, if the actual residence be broken; but here there could be no intention in the matter on the part of the lunatic herself.

HANNEN, J., concurred.

Rule absolute to quash the orders.

Attorneys for appellants: *Stone, Townson, & Morris.*
Attorney for respondents: *W. H. Swepstone.*

IN THE MATTER OF AN ARBITRATION BETWEEN J. & H. DOULTON AND THE METROPOLITAN BOARD OF WORKS.

1870
May 14.

Lands Clauses Act, 1869 (32 & 33 *Vict. c.* 18), *s.* 1—*Lands Clauses Act*, 1845 (8 *Vict. c.* 18) — *Construction — Arbitration by Agreement—Taxation of Costs.*

S. 1 of the Lands Clauses Act, 1869, enacts that "where in England under the Lands Clauses Act, 1845, or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled by one of the taxing masters of the superior courts of law . . .":—

Held, that this section only applies to arbitrations proceeding simply under the Lands Clauses Act, 1845, and not to arbitrations which embrace matters that could not be the subject of arbitration under the Lands Clauses Act, 1845, except by agreement between the parties.

Semble, that the section is not retrospective, and therefore does not apply to arbitrations under agreements made before the passing of the statute.

MOTION by the Metropolitan Board of Works for a rule, calling on Messrs. Doulton to shew cause why the costs in this matter should not be taxed by a master of this Court.

By 26 & 27 Vict. c. 75, the Metropolitan Board of Works were authorized to embank the south side of the river Thames. S. 15 incorporates the Lands Clauses Act, 1845 (8 Vict. c. 18), except ss. 34 & 92, and the Lands Clauses Act, 1860 (23 & 24 Vict. c. 106).

It became necessary for the purposes of the embankment that the Board should take some land belonging to Messrs. Doulton, and they were entitled to do so under their Act.

On the 17th of June, 1863, and the 10th of August, 1867, respectively, agreements were made between the Board and Messrs. Doulton, and one J. Stiff, by which it was agreed amongst other things that the Board should convey certain land of theirs to Messrs. Doulton, and should make certain dock entrances and do other specified works for Messrs. Doulton, and that Messrs. Doulton should convey to the Board the land required by the Board for the purposes of the embankment. That the price to be paid for the land conveyed by the Board to Messrs. Doulton, and by Messrs. Doulton to the Board respectively, and the amount of all the damage that might be sustained by Messrs. Doulton, by the making of the embankment, or by the exercise by the

1870

DOULTON v. METROPOLITAN BOARD OF WORKS.

Board of the powers of their Act should be settled by an arbitrator therein mentioned, and it was also agreed in the agreement of August 10, 1867, that "all the costs, charges, and expenses paid or incurred by Messrs. Doulton, or either of them, or which may hereafter be paid or incurred by them, or either of them, in or about or incidental to their opposition to the Thames Embankment Act, 1863, and in and about and incidental to the negotiation for and the preparation and execution of the said agreement of the 17th of June, 1863 (the costs, charges, and expenses as hereinbefore provided for, not to exceed 50*l.*), and also of this agreement in and about and incidental to the negotiations for and the preparation and execution thereof, and in and about and incidental to the reference under the said agreement of the 17th of June, 1863, and these presents and of any award or awards made in pursuance thereof, including all legal, surveying, and engineering expenses in any manner incurred by Messrs. Doulton since the passing of the said Act in relation to the lands and premises which form the subject of this agreement, shall be borne and paid to Messrs. Doulton by the Board, and shall in case of difference be from time to time settled by the arbitrator." And it was further agreed by the agreement of the 10th of August, 1867, "that the reference and award or awards under these presents shall, except as herein specially provided, in all respects be conducted and made in accordance with the provisions of the Lands Clauses Act, 1845, and be deemed to be a reference and award or awards under and subject to those provisions, except so far as the same may be modified by the provisions of this agreement." Subsequently, the arbitrator duly entered upon the inquiry into the matters thus agreed upon, and on the 12th of August, 1869, made an award, and the provisions of the award were duly carried out by all parties.

On the 14th of January, 1870, Messrs. Doulton delivered to the Board a bill of costs amounting to 3123*l.* 5*s.* 2*d.* The Board obtained an appointment from one of the masters of this Court to tax these costs under the Lands Clauses Act, 1869 (32 & 33 Vict. c. 18, s. 1). (1) Both parties attended the appointment, but Messrs.

(1) 32 & 33 Vict. c. 18, s. 1:— "Where in England, under the Lands Clauses Act, 1845, or any Act incorporating the same, any question of

Doulton then objected that the arbitrator, and not the master, was the proper person to tax these costs. The master then declined to proceed with the taxation. Afterwards Messrs. Doulton obtained an appointment from the arbitrator for the purpose of settling the amount of the costs. Both parties attended the appointment, but the Board objected that the master, and not the arbitrator, was the proper person to tax the costs. The arbitrator then declined to settle the amount of the costs.

Philbrick (1), in support of the motion, argued that the words of s. 1 of the Lands Clauses Act, 1869, were imperative, and therefore applied to this case, notwithstanding the agreement of August, 1867.

Bidder shewed cause in the first instance. He contended that the statute did not apply to this case. First, because the statute was not retrospective, and therefore could not affect this agreement, which was made before the statute was passed. Secondly, because the agreement excluded the provisions of the statute, as it expressly provided that the reference and award should be conducted under the Lands Clauses Act, 1845, "except as herein specially provided," and "except so far as the same may be modified by the provisions of this agreement." And the costs were "specially provided" for, and the provisions of the Lands Clauses Act, 1845, were, therefore, "modified by the provisions of this agreement." Thirdly, that the statute only applied to arbitrations proceeding simply under the Lands Clauses Act, 1845, and without any special terms which could only be introduced by the agreement of the parties.

LUSH, J. I think that this case is not within the Lands Clauses Act, 1869. Section 1 of that Act applies only to arbitrations pure and simple within the Lands Clauses Acts. I set aside the argument that the statute has not a retrospective effect, as to which it is not necessary to give any opinion. I should think, however, that the statute would not have a retrospective operation.

Even if the agreement between the parties in this case had been

disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award, shall, if either party so requires, be taxed and settled as between the parties by any one of the taxing masters of the superior courts of law. . ."

(1) In the Bail Court, before Lush, J.

1870

DOULTON v. METROPOLITAN BOARD OF WORKS.

made after the passing of the Act of 1869, I think the Act would not apply to it, because it is not of the kind contemplated by that Act. This agreement is a peculiar one, and not merely one for assessing compensation for land taken by the Board. Costs are also allowed over and above those which could be recovered under the Lands Clauses Act, 1845. These costs are to be paid by the Board, and it would be very inconvenient to hold that the Act applies to this agreement. If the Act were held to apply, the costs might have to be taxed by two different persons. I think that s. 1 of the Lands Clauses Act, 1869, can only be taken to apply to arbitrations pure and simple, begun and carried out under the Lands Clauses Acts. Where there are special agreements concerning matters to which those statutes do not apply, the Act of 1869 is not applicable.

Rule refused.

Attorney for Messrs. Doulton: *J. A. Rose.*

Attorney for the Metropolitan Board of Works: *W. W. Smith.*

May 7.

ALLEN, APPELLANT; THOMPSON, RESPONDENT.

Game—Using Engine or Instrument on Sunday—1 & 2 Wm. 4, c. 32.

By 1 & 2 Wm. 4, c. 32, s. 3, "if any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument of destruction for the purpose of killing or taking any game on a Sunday," he shall, on conviction, be liable to a penalty.

The appellant was convicted for that he, on the 15th of August (being Sunday), did use snares for the purpose of killing game. He set the snares on the 13th and 14th of August, and on the 15th the snares were seen set ready to catch game, and two dead grouse were found caught in snares:—

Held, that a snare was an engine or instrument within the meaning of the section, and that putting down a snare on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, was using an engine or instrument on Sunday.

CASE stated by Justices under 20 & 21 Vict. c. 43.

An information was preferred by the respondent against the appellant, under s. 3 of 1 & 2 Wm. 4, c. 32 (1), charging for that

(1) 1 & 2 Wm. 4, c. 32, s. 3:—"That if any person whatsoever shall kill or take any game, or use any dog, gun, net, or other engine or instrument

the appellant on the 15th of August (being Sunday), at the township of Bainbridge, in the North Riding of Yorkshire, did unlawfully use certain engines or instruments, to wit, snares for the purpose of killing game, to wit grouse, in a certain allotment contrary to the form of the statute.

The justices convicted the appellant, and fined him 5*s.* and costs.

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that the appellant was setting snares on the 13th and 14th of August in an allotment or pasture in the township of Bainbridge. There was no evidence to shew that the appellant was there on the 15th of August, but the respondent went into the allotment on that day, and saw fifty or sixty snares set ready to catch game, and found two dead grouse caught in two snares.

It was contended, on the part of the appellant, that the setting of the snares on the 13th and 14th of August, and not going on the land to examine them on the 15th of August, was not such a user as is contemplated by s. 3 of 1 & 2 Wm. 4, c. 32. It was also contended on his behalf that a snare or piece of wire such as was found set by the respondent, is not an engine or instrument within the meaning of that section.

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for the purpose of killing or taking game on a Sunday or a Christmas Day, such person shall, on conviction thereof before two justices of the peace, forfeit and pay for every such offence such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction; and if any person whatsoever shall kill or take any partridge between the 1st day of February and the 1st day of September in any year, or any pheasant between the 1st day of February and the 1st day of October in any year, or any black game (except in the county of Somerset or Devon, or in the New Forest, in the county of Southampton), between the 10th day of December in any year and the 20th day of August in the succeeding year, or in the county of Somerset or Devon, or in the New Forest aforesaid, between the 10th day of December in any year and the 1st day of September in any succeeding year, or any grouse, commonly called red game, between the 10th day of December in any year and the 12th day of August in the succeeding year, or any bustard between the 1st day of March and the 1st day of September in any year, every such person shall, on conviction of any such offence before two justices of the peace, forfeit and pay for every head of game so killed or taken such sum of money, not exceeding 1*l.*, as to the said justices shall seem meet, together with the costs of the conviction. . . ."

1870

ALLEN v. THOMPSON.

It was admitted that the appellant had a proper excise licence for killing game. It was also admitted that the appellant had the consent of the owner and occupier of the land to sport over it.

The justices were of opinion that snares are engines or instruments within the meaning of s. 3, and are expressly used for and applicable to the destruction of game; that leaving the snare set on a Sunday for the purpose of killing game is a user within the meaning of the section; that 1 & 2 Wm. 4, c. 32, is not an Act for the observance of the Sabbath, but that s. 3 provides for the preserving game during certain days and seasons, and that it is a breach of the statute to use snares on a Sunday so that game may be killed by them.

The questions for the opinion of the Court were, first, whether it is an offence against s. 3 of 1 & 2 Wm. 4, c. 32, to set snares on a Saturday (or any other day except Sunday), and allow them to remain set so as to catch or entrap grouse on a Sunday. Secondly, whether a snare is an engine or instrument within the meaning of s. 3.

Holker, Q.C. (*Macdonald* with him), for the appellant. A snare is not an engine or instrument, ejusdem generis, with "dog, gun, or net," neither was it used by the appellant on a Sunday within the meaning of s. 3. To bring the case within the section, it must be a manual user of an engine or instrument; or, at all events, the person must be present in order to use it. The statute was not passed for the preservation of game on a Sunday, but for preventing the desecration of the Sabbath; it is no offence, therefore, to set an engine on a Saturday and leave it set on Sunday. The case does not find that the appellant was there on Sunday. It never could have been intended that a man who lawfully put down snares for game on a Saturday is obliged to take them all up before Sunday morning.

The respondent did not appear.

BLACKBURN, J. The legislature have in s. 3 of 1 & 2 Wm. 4, c. 32, created two separate offences. The acts which constitute the two offences are different. In the first part of the section the killing or taking game, or using any instrument for the purpose of

killing or taking game on Christmas Day and Sunday, is made an offence; in the other part it is the killing or taking any partridge, &c., during certain times of the year, which is the offence; and there can be no doubt that if a person on a Saturday night puts down a snare with the intention that it shall be in operation on Sunday, and kills or takes game on that day, it is an offence. Mr. Holker has argued that, in order to commit the offence of using a net or other instrument for the purpose of killing game, a person must be present with the instrument using it; but it is clear that if a person intentionally causes the death of a grouse on a Sunday, he comes within the statute. Now, what the appellant did was, that he left the snares set on a Sunday, and we must take it that it was his intention that they should act in the way they would probably act, that is, kill game on the Sunday. I think that is using the snares on a Sunday. If he left a snare in such a state as to kill game, it is using it to kill game.

As to the other question, whether a snare is an engine or instrument ejusdem generis with dog, gun, or net, if it were made out that a personal use of the instrument were required by the terms of the section, the argument for the appellant might have weight. But the word engine, derived from ingenium, includes a snare which is a device or contrivance—an engine—for killing game.

MELLOR, J. I am of the same opinion.

LUSH, J. I am also of the same opinion. According to Mr. Holker's argument, there could not be a using of a snare longer than the moment during which it was being laid down; that cannot be the intention of the statute. The meaning of the section is, if any person puts down a snare and keeps it down, he is using it as long as he keeps it down.

Conviction affirmed.

Attorney for appellant: *W. P. Roberts.*

1870
May 14.

GRICE *v.* KENRICK.

Sale by Auction—Action by Auctioneer for Price of Goods—Agreement between Purchaser and Principal—Payment by Auctioneer to Principal.

The plaintiff, an auctioneer, was employed by W. to sell certain goods by auction. W. was indebted to the defendant in 60*l.*, and before the sale it was agreed between W. and the defendant that any goods the defendant might buy at the auction should go in payment of his claim against W. The plaintiff had no notice of this agreement at the time of the sale. The defendant bought several lots, to the amount of 49*l.*, and the plaintiff allowed him to take them away on the faith of his paying for them, but the defendant supposed that he was taking them in pursuance of the agreement with W. The day after the sale the plaintiff paid W. 90*l.* on account of the sale. Afterwards the defendant informed the plaintiff of the agreement between the defendant and W.; and after this notice the plaintiff, on the demand of W., paid over to him the balance due on the sale, about 100*l.*, after deducting his, the plaintiff's, commission and charges as auctioneer. The plaintiff then sued the defendant in the county court for the amount of his purchases at the sale:—

Held, that the defendant was entitled to the verdict. By the terms of the original agreement between the defendant and W. before the sale, the defendant was entitled to have the goods without payment, and the plaintiff's charges in respect of the goods had been satisfied before action. The plaintiff therefore (if he had not already paid over the amount) would have been bound to pay over the whole proceeds recovered in this action to W., who, by the agreement, was not entitled to anything. The facts, therefore, which shewed that W. would not be entitled to recover, established a defence to the action by the plaintiff. The fact that the plaintiff gave up the goods on the faith of the defendant paying for them created no liability in the latter, as he had been guilty of no deceit; and there were no facts beyond the mere receipt of the goods from which a promise on the part of the defendant to pay could be inferred. And the fact that the plaintiff had paid over to W. the price of the goods could not affect the defendant's rights, as the plaintiff had then had notice of the agreement between W. and the defendant.

Case stated on appeal from the County Court of Lancashire, holden at Liverpool.

The summons and particulars shewed that the action was brought to recover 49*l.* 11*s.* 10*d.*, the aggregate price of various lots of goods.

On the 6th of May, 1869, one William Weir, a grocer at Birkenhead, was indebted to the defendant in the sum of 67*l.* 11*s.* 6*d.* for tea sold and delivered. Weir advertised a sale of his stock in trade fixtures and effects, to take place on Monday, the 28th of June, and the defendant having heard of it, went over to Birkenhead and saw Weir, and obtained Weir's consent that he should

1870

GRICE v. KENRICK.

buy at the sale and place the amount against the debt due from Weir to him. Weir went to America shortly after the sale.

The plaintiff was the auctioneer, and the defendant attended at the sale. He bought the goods mentioned in the particulars of demand as an ordinary buyer, no communication having been made to the plaintiff as to the state of the accounts between the defendant and Weir, or of the arrangement which had been made between them.

In returning from the sale, the defendant met the plaintiff, and asked him for an order on his man in charge for the delivery of the goods in question. The defendant was well known to the plaintiff as a responsible person, and the order was accordingly given without payment being required beforehand. The plaintiff was still in ignorance of anything in the relations between the defendant and Weir to take the matter out of the ordinary course of business, and said nothing of his lien for commission and charges. The goods were removed by the defendant the same day. The same evening, or the next morning, and before any further interview between the plaintiff and the defendant, the plaintiff paid a sum of 90*l.* to Weir on account of the sale. Weir subsequently called on the defendant and paid him 5*l.* on account of the debt, desiring the defendant to settle with the plaintiff, and he (Weir) would settle with the defendant. The defendant declined to do so, and said he would insist on keeping the original arrangement.

The defendant called on the plaintiff on Tuesday, the 29th, and told him of the bargain he had made with Weir, desiring that he would not pay over to Weir the amount of the purchases made by the defendant at the sale. The defendant promised verbally to indemnify the plaintiff, but no written indemnity was tendered or prepared.

On the same day, the 29th of June, the following letter was received by the plaintiff from the attorney of Weir:—

"Sir,—I am instructed by Mr. William Weir, of Birkenhead, to apply to you for an account of all moneys received on his account, and for the amount of the balance in your hands to be paid over to me by noon to-morrow. From what he informs me, I understand there is some question between Mr. Weir and Mr. Kenrick. Mr. Weir will meet Mr. Kenrick's claim at the proper

1870

GRICE v. KENRICK.

time. With that, I take it, you have nothing to do. Let me have the account in the morning."

In consequence of this letter the plaintiff paid over to Weir the balance remaining due on the sale, which was about 100*l.*, deducting the full amount of his commission and charges as auctioneer.

On this state of facts it was contended by the advocate for the defendant that the plaintiff had waived his lien for commission and charges, that he could only sue so long as his lien for commission and charges remained unpaid, and that he, having deducted and retained the amount of such commission and charges in his settlement with Weir, had no interest remaining to entitle him to maintain this action, and that he had paid the money to Weir in his own wrong.

The judge held that there was no objection, on the ground of want of interest, to the plaintiff recovering; and having been required by his principal Weir to pay over the amount to him the plaintiff had a right to be repaid by the defendant, to whom he had delivered the goods on the faith of his paying for them in the usual way.

The judge accordingly, without calling on the plaintiff's counsel to reply, on the evidence, gave a verdict for the plaintiff for the amount claimed.

The question for the opinion of the Court was, whether the judge's ruling was correct in point of law. If the Court should be of opinion that the ruling was correct, the appeal was to be dismissed. If the Court should be of a contrary opinion, a verdict for the defendant was to be entered, or a new trial to be granted.

Feb. 11. *R. G. Williams* (with him *J. S. Will*), for the defendant. Conceding that an auctioneer may in general maintain an action for the price of goods sold by him, the facts here shew conclusively that the plaintiff cannot maintain this action. The agreement with Weir and the fact that the plaintiff had been paid his charges make up what was wanting for a good defence in *Robinson* v. *Rutter*. (1) What Lord Campbell, C.J., says, in *Holmes* v. *Tutton* (2), is directly in point. "There may be some

(1) 4 E. & B. 954; 24 L. J. (Q.B.) 250.

(2) 5 E. & B. at p. 81; 24 L. J. (Q.B.) at p. 352.

doubt whether the auctioneer, not having the possession of the goods, and it not appearing whether he sold in his own name, and his lien for the price having been covered by the money he received, so that he might be found to have paid himself out of the proceeds received, could have sued the plaintiffs for the price of the goods; but if he could, we think that, in an action for the price of the goods so sold, it would be a good answer, either at law, or at all events by way of equitable defence, to shew for the defendant that the lien of the auctioneer was satisfied, and that he was suing merely for the principal, and that there was a set off as between the principal and the vendee of the goods." By the previous agreement between Weir and the defendant there never was any debt on the part of the defendant, and no action could be maintained by the principal: *Bartlett* v. *Purnell* (1); and the agent cannot be in a better position, at all events after notice and payment of his charges. [He also referred to *Coppin* v. *Craig* (2), *Isberg* v. *Bowden* (3), and *Cochrane* v. *Green.* (4)]

Hance, for the plaintiff. The ground on which an auctioneer can maintain an action for the price of the goods sold by him is not simply his interest for commission; and if he allows the goods to be taken away without payment, it is at his own risk that he gives credit to the purchaser: *Williams* v. *Millington.* (5) Here the plaintiff allowed the defendant to have the goods on the faith that he would pay for them. *Robinson* v. *Rutter* (6) is a direct authority that payment to the principal is no answer to an action by the auctioneer.

R. G. Williams, in reply. The defendant made no promise when he obtained the goods; he thought he was receiving them in pursuance of his agreement with the plaintiff's principal; and before the plaintiff paid over the money to his principal he had notice of this agreement. Here there never was a debt between the defendant and the principal; but the principle of the case is very much the same as if there had been a debt, and the defendant had sought to set off the debt due to him by Weir, which he

(1) 4 Ad. & E. 792.
(2) 7 Taunt. 243.
(3) 8 Ex. 852; 22 L. J. (Ex.) 322.
(4) 9 C. B. (N.S.) 448; 30 L. J. (C.P.) 97.
(5) 1 H. Bl. 81, 85.
(6) 4 E. & B. 954; 24 L. J. (Q.B.) 250.

1870

GRICE v. KENRICK.

clearly could: *Agra Bank* v. *Leighton*. (1) There Channell, B. says: "As to the set off, our decision will be in accordance with the rule to be deduced from the case of *Cochrane* v. *Green* (2); there the cestui que trust was allowed to set up his trustee's claim against the plaintiffs; here, conversely, we allow the defendant to set up against the trustee's claim the debt due from the cestui que trust."

Cur. adv. vult.

May 14. The judgment of the Court (Mellor, Lush, and Hannen, JJ.) was delivered by

HANNEN, J. This was an appeal from the county court of Lancashire, holden at Liverpool. The plaintiff, an auctioneer, was employed by one William Weir to sell certain goods by auction. The action was brought to recover the price of the articles bought by the defendant at the auction and afterwards received by him. The defence set up was, that before the sale the defendant, who was a creditor of Weir, had agreed with him that he should bid at the auction, and should receive the goods for which he should be the highest bidder in payment of the debt due to him. It was contended on behalf of the plaintiff, that, as he had no notice of this agreement at the time of the sale, and gave up the goods to the defendant on the faith of his paying for them, he, the plaintiff, was entitled to recover.

In support of this contention the case of *Robinson* v. *Rutter* (3) was cited. In that case, to a declaration for the price of a horse sold and delivered, the defendant pleaded that the plaintiff sold the horse, as an auctioneer, agent, and trustee, for one Kersey, and that the defendant had paid Kersey before action brought. This was held a bad plea. Lord Campbell, in giving the judgment of the Court, says: "It must be presumed that the plaintiff had a debt due to him from Kersey in respect of the sale, to be satisfied from the proceeds of the sale. The plea does not allege that this debt was paid, nor shew how the plaintiff had no longer a right to sue, nor even aver that he had notice of the payment being made to

(1) Law Rep. 2 Ex. 56, 65.
(2) 9 C. B. (N. S.) 448; 30 L. J. (C.P.) 97.
(3) 4 E. & B. 954; 24 L. J. (Q.B.) 250.

Kersey. . . . The defendant should have shewn that by the terms of the sale, or by facts accruing subsequently, a payment to Kersey was permitted, and operated as a discharge of the plaintiff's claim."

In the present case, however, the conditions which were wanting in *Robinson* v. *Rutter* (1) are supplied. By the terms of the original agreement between the defendant and Weir the defendant was entitled to have the goods without payment; and it appeared that, as between the plaintiff and Weir, the plaintiff's charges in respect of the goods delivered to the defendant had been satisfied before action. If the plaintiff were to recover the amount in the present action, he would be bound to hand over the whole proceeds (if he had not already done so) to his employer, who, however, by agreement between him and the defendant, was not entitled to receive anything. Any facts, therefore, which shew that Weir would not be entitled to recover, establish a defence to an action brought by the plaintiff.

But it was contended that the fact that the plaintiff gave up the goods to the defendant on the faith of his paying for them created a liability on the part of the latter to make such payment. If there had been any deceit practised by the defendant on the plaintiff, or if there had been any facts accompanying the receipt of the goods from which a promise on the defendant's part to pay the auctioneer could be inferred, the plaintiff would be entitled to recover; but the defendant, in obtaining the goods from the plaintiff without payment, did no more than he was entitled to do as between himself and Weir, and he was justified in assuming that the plaintiff, in giving up the goods without payment, was doing so in fulfilment of the agreement of his principal. No promise to pay the plaintiff, therefore, can be inferred from the mere receipt of the goods by the defendant, and no other facts are stated from which such a promise can be implied.

It was further argued on behalf of the plaintiff that, as he had before action paid over to Weir, on his demand, the price of the goods, he was entitled to sue the defendant; but, as the payment was made to Weir after notice of the agreement between him and the defendant, the plaintiff could not by such payment prejudice the defendant's rights.

(1) 4 E. & B. 954; 24 L. J. (Q.B.) 270.

1870

GRICE v. KENRICK.

For these reasons we think that the facts established a defence to the plaintiff's demand, and a verdict must be entered for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Parker, Rooke, & Parkers.*

Attorneys for defendant: *Johnson & Weatheralls, for Grocott, Liverpool.*

May 14.

NOTARA AND ANOTHER *v.* HENDERSON AND OTHERS.

Ship and Shipping—Duty of Master or Shipowner as to Goods damaged on the Voyage.

The plaintiffs shipped beans on the defendants' ship, under a bill of lading, to be carried from Alexandria to Glasgow, deliverable to the plaintiffs' order on payment of freight by consignees. At Liverpool the ship met with damage by collision, and was obliged to put in to repair; the beans were wetted by sea water in consequence of the collision, and the repairs only taking a few days, there was no time to have taken out the beans, dried, and reshipped them; but the plaintiffs, being at Liverpool and hearing of the disaster, objected to the beans being taken on in their then condition, and the defendants' agent proposed to them to receive the beans at Liverpool on payment of the whole freight. The plaintiffs were ready to receive the beans, but refused to pay more than freight pro ratâ to Liverpool; consequently, the beans were taken on as they were. Damage from collision was one of the excepted perils:—

Held, that the plaintiffs were entitled to recover for the damage to the beans occasioned by their having been carried on in their wet condition: for that the defendants were not justified in taking on goods contrary to the express commands of the shipper, and sacrificing them merely for the purpose of earning the freight.

Case stated after issue joined. (1)

1. This is an action brought for the recovery of an amount to be settled hereafter, but which the plaintiffs claim as exceeding 2000*l.*, for damage to 2589 ardebs of beans shipped by the plaintiffs in the defendants' screw steamer *Trojan*, to be carried by the defendants from Alexandria to Glasgow, according to their bill of lading dated Alexandria, the 25th of September, 1868.

The plaintiffs are Greek merchants, carrying on business in partnership at Liverpool. The defendants are the owners of the

(1) The declaration was for not delivering the beans "in the like good order and condition;" but no reference was made to the pleadings in the course of the argument.

screw steamer *Trojan*, one of a line of steamers trading between Glasgow and Liverpool and the ports of the Mediterranean. The plaintiffs shipped the beans on board the *Trojan* at Alexandria, and received from the defendants' agent a bill of lading, which was in the usual form, and by which the beans were to be delivered in the like good order and condition at the port of Glasgow, the act of God, the Queen's enemies, pirates, restraint of princes and rulers, fire at sea and on shore, accidents from machinery, boilers, steam, loss or damage arising from collision or other accident of navigation occasioned by default of the master or crew, or any other accidents of the seas, rivers, and steam navigation of whatever nature or kind soever excepted, unto order Messrs. Notara Brothers, of Liverpool, or to their assigns, freight payable by the consignees at the rate of 5*s.* 3*d.* per imperial quarter of 480 lbs.

2. The *Trojan* left Alexandria on the 26th of September, 1868, and called at Liverpool on the 23rd of October, on her way to Glasgow, with the beans on board in good order and condition. At Liverpool the *Trojan* unloaded part of the cargo, which was consigned to that port.

3. On the 24th of October the *Trojan*, on her proceeding down the river, without any fault of her owners, officers, or crew, and whilst in charge of a pilot compulsorily employed, came into collision in the Mersey with the screw steamer *Demetrius*, whereby a breach was made in her side, her fore compartment was filled with water, and the ship was obliged to be run ashore on the beach at Seacombe to prevent her sinking. The same evening a gale sprang up from the north, and caused a heavy sea on the beach where the ship was, and the water broke over and into the fore and main hatches, which were burst up. The cargo, on leaving Liverpool, consisted of the beans in question, which were stowed in the fore and main holds, a quantity of wheat, and some bags of shumac and boxes of lemons. The whole of the beans and wheat were, owing to the collision and owing to the sea subsequently breaking into the fore and main holds, saturated with salt water, and a small portion of the beans and wheat was washed away.

4. The *Trojan* was got off shore on the morning of Monday, the 26th of October, towed up the river, and again beached in a better

1870

NOTARA v. HENDERSON.

and safer place till the 27th, when she went into a graving dock at Liverpool to get the leak temporarily stopped.

5. In order to lighten the ship, and enable her to be repaired so as to complete her voyage to Glasgow, part of the beans, which were in the fore and midship compartments, was taken out in their wet condition, and put into lighters directly after the collision, and remained in the lighters until reshipped, and the other part was, after the vessel got into the graving dock, removed and spread out in the ship's after-between-decks for the convenience of the ship. When the leak had been stopped, and the ship sufficiently repaired to enable her to complete her voyage to Glasgow, such of the beans as had been so taken out and removed were, without being dried, replaced, and the ship proceeded to Glasgow.

6. The plaintiffs do not claim for the damage resulting to the beans from the wetting by the collision, but for the damage arising from nothing having been done to arrest or mitigate the process of decomposition and otherwise which resulted from such wetting.

7. The defendants had a resident agent at Liverpool called Botterill, whose duty it was to communicate with, assist, and advise the captains of defendants' ships in all matters relating to the ships and cargoes. On the 26th of October the plaintiffs sent to Botterill the following letter:—"Sir,—It is reported to us that you intend the *Trojan* steamer to go on to Glasgow at once with her cargo. As we understand the vessel is not in fit condition to complete the voyage, we beg you to take notice that we object to this course until an examination has been made by competent surveyors. Moreover, we are led to suppose that our cargo is not fit to go forward, and we shall hold you responsible if it be taken on in its present condition."

No written reply was sent to this letter, but the next day Botterill called at the plaintiffs' office and saw one of the plaintiffs, and told him that it was intended to repair the ship temporarily, and for her to proceed to Glasgow. Botterill asked the plaintiff if he would be willing, as he wished to take delivery of the beans at Liverpool, to pay freight as per bill of lading on quantity delivered, allowance being made for wet, and to give up bill of lading, sign average bond, and make a deposit on account of general average. The plaintiff said he would consider it, and at a subsequent inter-

view with Botterill on the same day agreed to all the conditions, except as to the freight, plaintiff offering to pay 3s. 9*d.* per quarter only, being proportion of freight payable from Alexandria to Liverpool, according to the plaintiffs' estimate, instead of 5s. 3*d.*, and declining to pay more. Botterill, at another interview with the same plaintiff on the following day (the 28th of October), stated that he might have delivery of the beans on payment of freight as per bill of lading, and asked him distinctly if he had decided not to pay that freight, and the plaintiff said that he had decided not to pay it.

8. On the 28th of October a survey was made of the cargo by two surveyors, as follows: "At the request of Messrs. Notara Brothers, we, the undersigned corn-factors, have this day surveyed a quantity of beans on board the screw steamer *Trojan*, from Alexandria, now lying in the Herculaneum Graving Docks, and find the same all badly damaged by sea water, and we recommend that the whole be discharged and sold as quickly as possible, as by every day's delay on board the vessel they will be much deteriorated in value."

This survey was not communicated to Botterill or any other person acting for the defendants, or to the defendants themselves.

9. On the same day, and after the interview of that date mentioned in paragraph 7, Botterill received a further letter from the plaintiffs:—"Sir,—Referring to our letter of the 26th, we have again to press upon you the necessity of a discharge of the damaged cargo. We conceive that there are two courses open to you; you may either take out the beans and re-ship them when properly dried, or you may give us delivery, making a proportionate abatement in the freight. We must ask for your immediate decision, as delay is increasing the extent of the damage, and we have now to repeat our previous intimation that we shall hold you responsible for any further loss which may ensue."

No reply was made to this, and no further communication took place.

10. Botterill was in communication with the defendants in Glasgow. The telegrams and letters which passed were contained in an appendix, but were not referred to in argument.

1870

NOTARA v. HENDERSON.

11. The beans taken out of the vessel were not taken out for the purpose of drying them. The portion taken out and put into lighters was taken out for the purpose of lightening the ship and getting her into a place of safety, and amounted to about a fourth of the entire quantity.

12. The beans might have been removed from the ship to warehouses, for the purpose of being spread out and dried; such warehouse accommodation could have been obtained about half a mile from the graving dock.

13. By this means a material benefit would have accrued to the beans, and the process of decomposition would have been materially arrested or mitigated.

14. If the beans had been unshipped, dried, and reshipped at Liverpool, the charges of such unshipping, drying, and reshipping would have been particular average, payable by the owners of the beans, according to the custom of average staters.

15. The repairs of the *Trojan* were completed so as to enable her to proceed to Glasgow in the afternoon of the 30th of October, when she left the graving dock, and the same evening she left Liverpool with the beans and other cargo, and arrived in Glasgow about midnight on the 31st.

16. The best possible price for the cargo of beans, on its arrival in Glasgow, was realized by the plaintiffs, and everything proper was done by them, and the gross amount actually realized by the sale of the cargo was 1167*l.* 7*s.* 8*d.* The gross sum that would have been produced by the beans, according to the current prices in the market, if they had been delivered in good condition, would have amounted to about 3500*l.*

17. The difference in amount between what the beans actually realized in Glasgow and what they would have realized if they had been unshipped, dried, and reshipped at Liverpool, amounted, in the event which happened, to a considerable and material sum; and such difference, or any other amount, which the Court may consider to be the proper criterion of damages, if any, shall be ascertained by an arbitrator after the judgment of the Court has been given.

18. The pleadings, interrogatories, and answers to interrogatories were to form part of the case, but no reference was made to them

in argument. The Court was to have all powers of amendment and of drawing inferences.

The question for the opinion of the Court was, whether the plaintiffs are entitled to recover; and, if so, the Court was to have power to give any directions as to the principles on which the damages are to be assessed.

Jan. 21. *Milward, Q.C.* (*J. Scott, Junr.*, with him), for the plaintiffs. The original injury to the beans was caused by an excepted peril; the plaintiffs are suing for the damage caused by taking them on without doing anything to prevent decomposition. Notwithstanding the accident, the master was bound to take all possible care of and do his best for the cargo: *Niagara* v. *Cordes* (1), *King* v. *Shepherd* (2); and the case finds that the beans might have been removed and dried, or they might have been sold; at all events the master was not justified in carrying them on in their then state, simply for the purpose of earning the freight. A shipowner is a common carrier, and is subject to all the liabilities which are not excepted by the bill of lading: *Laveroni* v. *Drury*. (3) In 2 Parsons on Shipping, p. 22, it is said "If goods are wet, the master should, if it is possible, unpack and dry them;" for which he cites American authorities; but he adds, "He is not, however, bound to delay his voyage for the sake of the goods." But it is clear if they will be spoilt by being carried on, he has no right to carry them on simply in order to earn the freight: see the judgment of the Privy Council in *Tronson* v. *Dent*. (4) [He also cited Pritchard's Admiralty Digest, vol. i. p. 82, tit. Cargo, note 9].

C. Hutton, for the defendants. The plaintiffs, the owners, were on the spot, and it was for them to exercise their discretion, and they allowed the cargo to go on. It is only when the owners cannot be communicated with that there is any obligation on the master or shipowner to act for them, and determine what to do with a damaged cargo.

Milward, Q.C., in reply, referred to *Grill* v. *General Iron Screw Collier Co.* (5)

Cur. adv. vult.

(1) 21 Howard, U. S. R., 7, 28.
(2) 3 Story, U. S. R., 349.
(3) 8 Ex. 166; 22 L. J. (Ex.) 2.
(4) 8 Moo. P.C. 419, 449–454.
(5) Law Rep. 1 C.P. 600, 611–612.

1870

NOTARA v. HENDERSON.

May 14. The judgment of the Court (Cockburn, C.J., Mellor and Lush, JJ.) was delivered by

COCKBURN, C.J. This was an action brought by the plaintiffs, who are merchants at Liverpool, against the defendants, who are the owners of the steamship *Trojan*, one of a series of steamers trading between Alexandria and the ports of Liverpool and Glasgow, under the following circumstances.

In September, 1868, a cargo of beans was shipped on board the *Trojan* on plaintiffs' account, consigned to their order at Glasgow. The *Trojan* arrived at Liverpool on the 23rd of October, and, having discharged the part of her cargo destined for Liverpool, proceeded, on the 24th, on her voyage to Glasgow; but, on the same day, while proceeding down the Mersey, she came into collision with another steamer, whereby a breach was made in her side, and her ~~five~~ compartments having filled with water, she was obliged to run ashore to prevent her sinking. A gale springing up, the water broke over her, and forced its way into the main and fore hatches where the beans were; by means of which the beans became saturated with salt water. The ship was got off on the morning of the 26th, was towed up the river, and again beached on a safer place till the 27th, when she went into a graving dock at Liverpool to get the leak temporarily stopped. To lighten the ship and enable her to be repaired, part of the beans were taken out, and put into lighters, but the bulk of the cargo remained on board. Part of the latter was, but only with a view to the convenience of the vessel, spread out on the after-between-decks; but both the latter portion, and that placed temporarily into lighters, was re-stowed without having been effectually dried; nothing whatever was done towards drying the residue of the cargo which remained unremoved. The necessary repairs having been done to the ship to enable her to proceed on her voyage to Glasgow, she was enabled to leave Liverpool on the afternoon of the 30th.

In the meantime the plaintiffs, having heard of the damage sustained by the vessel, as early as the 26th, notified to the agent of the defendants at Liverpool their objection to the master proceeding on his voyage to Glasgow in the then condition of the ship and cargo. A negotiation ensued, the agent proposing to the plaintiffs to receive the cargo at Liverpool, which the plaintiffs

were quite ready to do, provided a proportionate abatement was made in the freight. This, however, the agent refused to make, insisting on payment of the entire freight as though the cargo had been conveyed to Glasgow. The negotiation consequently came to nothing, and the vessel proceeded on her voyage. On the beans being unshipped at Glasgow, they were found to be greatly deteriorated by reason of having remained so long in their state of saturation with salt water; and there can be no doubt that their detention in that condition on board the vessel had added very considerably to the mischief originally done by the salt water getting into the cargo.

The beans having been sold at a very reduced price by reason of their damaged condition, this action is brought, not for damage arising from the collision, in respect of which it is admitted that the defendants were not liable, but for damage arising by reason of the master's neglect in not taking measures to dry and improve the condition of the beans prior to proceeding on his voyage to Glasgow.

The law applicable to such a case appears to us to be free from any serious difficulty. In every contract to carry for freight there is an implied obligation on the part of the shipowner, that in the event of any disaster happening to the ship or cargo in a port where correspondence cannot be had with the freighter, the master shall act as his agent, and use his best efforts for the protection and preservation of the cargo. He must, in such an emergency, put himself in the place of the owner of the cargo, and do what the latter, as a prudent man, would himself do for his own interest if he were present. "If the cargo," says Lord Stowell in the case of *The Gratitudine* (1), "is a perishable cargo, and the vessel is unable to proceed, or stands in need of repairs to enable her to proceed in time, . . . the master must exercise his judgment whether it would be better to tranship the cargo, if he has the means, or to sell it. He is not absolutely bound to tranship; he may not have the means of transhipment; but even if he has, he may act for the best in deciding to sell. If he had not the means of transhipping, he is under an obligation to sell, unless it can be said, that he is under an obligation to let it perish."

(1) 3 Rob. Adm. at p. 259.

1870

NOTARA v. HENDERSON.

On the other hand, the master is not bound to delay the voyage to the prejudice of his owner, in order to put the cargo in a condition fit to be carried on. It cannot be contended that, if a vessel happened to ship a heavy sea, and goods on board became wetted and liable to be damaged, but the ship still remained in a fit condition to prosecute the voyage, the master would be bound to put into the nearest port in order to tranship and dry the cargo. Nor would it be more reasonable to hold that, having been compelled to put into port to repair, he is bound, beyond doing all that he reasonably can do during his stay there, to improve the condition of the damaged cargo, and to mitigate the injury as far as possible, to wait till the cargo is fit to be carried on, though the voyage might be thereby unduly protracted. The reasoning of Lord Stowell equally applies to this state of things, as to the case then before the Court. The master must not take on the cargo, with the certainty that it will perish or greatly deteriorate on the voyage, but must do the best that can be done with it, considering it as cargo which he is obliged to leave behind.

This question has not, so far as we are aware, previously come before our courts for decision; but it has twice come before the American courts in the cases of *Steamboat Lynx* v. *King* (1); and *Soule* v. *Rodocanachi* (2), referred to in 2 Parsons on Shipping, p. 22, in both which cases it was held that the master was not bound to delay his voyage for the sake of the goods. We entirely agree in the principle of these decisions, although we by no means desire to be understood as saying that if a vessel is in port, and by a delay of some comparatively insignificant period which would prejudice no one, the master might carry on the goods to their destination, it would not be his duty to wait for them.

In the present case it appears that the cargo might have been conveyed to warehouses, which are stated to have been within half a mile of the ship, and might there have been spread out and dried, whereby much of the damage would have been prevented. And it is admitted, that the expense of unshipping, warehousing, and reshipping, would have fallen on the plaintiffs, who were willing to undertake it, so that no difficulty would have arisen on the score of expense. But it also appears from the dates, that the

(1) 12 Misso. 272. (2) 1 Newb. Adm. 504.

beans could not have been unshipped till the 28th of October, while the vessel was ready to sail in the afternoon of the 30th. It is not alleged that a material improvement could have been effected in the condition of the beans if unshipped and reshipped in the interval, and we must take it on the facts that no good would have ensued from such a proceeding, and that a far longer period would have been necessary to effect the purpose; a period during which it would have been unreasonable to expect the ship to be delayed.

Now, as we have already said, we think that the master was not bound to delay proceeding on his voyage to Glasgow, when the ship had been sufficiently repaired to enable her to go to sea. And, the necessary repairs requiring only so short a period for their completion, to have unshipped, warehoused, and reshipped the cargo in the interval, would have been an idle and fruitless expense.

What, then, ought the master to have done? If he had been in a foreign port where the freighter was not, and could not have been consulted, it would have been his duty, either to provide for sending home the cargo, when sufficiently dry, by another ship, or for selling it on the spot, as might best serve the interest of the freighter. He could not have justified the taking them on in their then condition, if any better course could have been adopted. And if he had sold them, he would not have been entitled, according to the decision of the Court of Exchequer, in the case of *Vlierboom* v. *Chapman* (1), even to freight pro ratâ. There a ship, bound to Rotterdam, having encountered a severe hurricane, and put into the Mauritius, the cargo was found to be so damaged that it was necessary to sell it, to prevent it from becoming utterly worthless from the progress of rapid putrefaction, and the Court held, that as there was no voluntary acceptance of the goods at the intermediate port, to raise the inference of a new contract to pay freight pro ratâ, an inference which is the necessary foundation of such a claim, and as the goods had not been carried to their destination, the shipowner could not recover any freight at all.

Here the freighter was on the spot, and therefore no agency,

(1) 13 M. & W. 230.

1870

NOTARA v. HENDERSON.

such as we have referred to, was, to use the language of Lord Stowell, in the case before quoted, "forced upon the master," and consequently he had no discretion as to dealing with the cargo. He could not sell it, he was not bound to wait for it. Was he to carry it on in a perishing condition for the sole purpose of earning his full freight? That, as we have shewn, would have been wrongful, if done at a foreign port, and, if wrongful there, as being contrary to the implied authority of the freighter, how can he justify doing so at a home port against the freighter's express commands?

The cases of *The Gratitudine* (1), and of *Vlierboom* v. *Chapman* (2), already referred to, are authorities to shew that a master would not be entitled to carry on a cargo in an unfit state for the purpose of earning the freight. And though, if the matter were res integra, we might think there is much force in the argument urged in the latter case, that if the master is to be considered as agent for the freighter to accept the cargo and sell the goods, he may very well be considered as his agent also to accept on the just and equitable terms of paying freight pro ratâ, no such difficulty arises in this case, as the freighter was here present and was willing to pay pro ratâ.

We are therefore of opinion, that the taking on of the goods, and thus sacrificing them to the ship, was, under the circumstances, unjustifiable, and renders the shipowners liable for the loss thereby occasioned. Our judgment must, therefore, be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Gregory, Rowcliffes, & Rowle.*
Attorneys for defendants: *Maynard, Son, & Co.*

(1) 3 Rob. Adm. 240, 259. (2) 13 M. & W. 230.

CRAMER AND COMPANY, LIMITED, *v.* MOTT.

1870
May 14.

Landlord and Tenant—Distress without actual Seizure.

W. occupied lodgings in the defendant's house at a weekly rent. He brought a piano with him, which he had hired of the plaintiffs. The plaintiffs sent two men to fetch away the piano; the defendant's wife met the men in the passage of the house outside the room in which the piano was, and having been informed of their object, said, in the presence of W., who was at the door of the room, the piano should not leave the house unless what was owing from W. for rent and board were paid. The wife was acting by the defendant's authority; and there was rent due from W. The plaintiffs having brought an action for the conversion of the piano, the defendant justified the detention as a distress. The judge directed a verdict for the defendant:—

Held, that there might be a distress without actual seizure, and that what had occurred amounted to a distress.

Wood v. *Nunn* (5 Bing. 10) approved.

DECLARATION for conversion of the plaintiffs' piano.

Plea: Not guilty, by statute (11 Geo. 2, c. 19, s. 21).

Issue joined.

At the trial before Mellor, J., at the sittings after Easter Term, 1869, it appeared that a Mr. Wynne occupied apartments in the defendant's house at a weekly rent of 12*s*. He brought a pianoforte with him, which he had hired of the plaintiffs on certain conditions; and, the conditions not being complied with, the plaintiffs sent two men on the 16th of January, 1869, to fetch away the piano. The defendant's wife met the men in the passage of the house, just outside the door of the room in which the piano was, and being informed that they had come to fetch the plaintiffs' piano away, she said the piano should not leave the house unless the defendant's claim for rent and board due from W. were satisfied. At this time there was 4*l*. 10*s*. due from W. for rent, besides board. W. came to the door of the room in which the piano was, and said the piano must go; but the defendant's wife again refused to let it go unless W. paid what he owed, and the plaintiffs' men went away. On the 19th of January the men came again. The defendant's wife had, in the meantime, informed the defendant of what she had before done, which he had approved; and she again refused to allow the piano to be removed for the same reasons. On the 20th of January the piano was formally distrained by the

1870

CRAMER v. MOTT.

defendant, and ultimately it was sold under the distress. On the 21st of January this action was commenced.

The learned judge told the jury that if they believed that the defendant, by his wife, who was shewn to have been acting as his agent, bonâ fide detained the piano for the rent in arrear, that amounted to a distress without actual seizure; and they ought to find for the defendant. The jury returned a verdict for the defendant.

A rule was obtained for a new trial on the grounds: 1. That there was no evidence in support of defendant's plea which ought to have been left to the jury. 2. Of misdirection, in directing the jury that, if they believed that the defendant detained the piano for rent when the plaintiffs demanded it, such detention would amount to a distress. 3. That the judge ought to have directed the jury to find a verdict for the plaintiffs.

Udall, and *Thompson*, shewed cause. The detention of the piano, by refusing to allow it to leave the house until the rent was paid, amounted to a distress, perhaps informal, but that is not the question. There are two authorities directly on the point. It is said in Addison on Torts, p. 513, 3rd ed., citing *Cotton* v. *Bull* (1): "Where a lodging-house keeper, to whom rent was due for the hire of furnished apartments, refused to permit the wearing apparel, jewels, and chattels of the tenant to be removed from the apartments, saying he should detain them until his rent was paid, and the tenant brought an action for the conversion, it was held the detention amounted to a distress for rent, and that the action was not maintainable." In *Wood* v. *Nunn* (2) the defendant, a landlord, to whom rent was in arrear, hearing that a machine was about to be removed, entered on the premises, and, laying hands on the machine, said, in the presence of the tenant and the plaintiff, who claimed property in the machine: "I will not suffer this or any of the things to go off the premises till my rent is paid." The plaintiff, however, carried the machine off, and the defendant afterwards seized it; and it was held that there was sufficient distress to entitle the defendant to the article in question. *Swann* v. *Earl of Falmouth* (3), *Hutchins* v. *Scott* (4), *Evans* v. *Elliott* (5), shew that a mere detention is sufficient distress.

(1) Easter Term, 1857, C. P. (2) 5 Bing. 10. (3) 8 B. & C. 456.
(4) 2 M. & W. 809. (5) 5 Ad. & E. 142.

Popham Pike, and *Shiel*, in support of the rule. There was here no distress. In most of the cases cited by the other side it was as against the landlord that the acts were held to amount to a distress; this at once distinguishes them from the present case. The case from Addison on Torts, 3rd. ed. p. 513, is of no authority; it is not given ex relatione of the author or of any one else. In *Wood* v. *Nunn* (1), the landlord made an entry on the premises, and actually seized the machine by putting his hands on it. In the present case the defendant's wife was not on the demised premises, nor was she in a position to seize the piano, had she been so minded.

COCKBURN, C.J. I am of opinion that this case is governed by *Wood* v. *Nunn* (1); in substance the facts are the same. In that case there was an actual seizure by putting hands on the article; but a seizure may be constructive as well as actual. In the present case, on the plaintiffs' men coming for the piano, the defendant's wife meets them in the passage just outside the room in which the piano is, and says, "the piano shall not be taken away till our rent is paid." She was not, perhaps, actually on the demised premises, being outside the door of the room; but she was close to the door, the tenant being at the door, and she was so close that if the men had persisted in attempting to remove the piano, she could have at once interfered and prevented the removal. The case is, therefore, substantially on all fours with *Wood* v. *Nunn* (1), which I think was well decided. I think there need not be an actual seizure to create a distress; it is enough that the landlord or his agent takes effectual means to prevent the removal of the article from off the premises, on the ground of rent being in arrear; and he does this when he declares that the article shall not be removed till the rent is paid.

BLACKBURN, J. I am also of opinion that this rule must be discharged, both on the authority of *Wood* v. *Nunn* (1), and on principle. At common law a landlord could seize any chattels on the demised premises, but could only detain them till the rent was paid; and, although he had a right to seize the goods of a stranger, practically there was no hardship, as the landlord was bound

(1) 5 Bing. 10.

1870

CRAMER v. MOTT.

to give up the goods on tender of the rent. But the legislature intervened, and gave the landlord a power to sell, after certain formalities; and the consequence is, whether it was intended or not, inasmuch as the landlord is empowered to sell any goods which he may seize, he may also sell the stranger's goods. This, no doubt, is a great hardship; but such is the law. The question here is, therefore, whether a distress was made on the 16th, when the defendant's wife detained this piano which was on the demised premises. The act of the wife was ratified by the defendant, if she had not previous authority. I think, both on principle and authority, the refusal to allow an article to leave the premises, unless the rent in arrear be paid, amounts to a distress. Afterwards, the piano was sold, and probably there may have been irregularities, but that is not now the question; so long as rent was due, the distress cannot be treated as a nullity.

HANNEN, J. I am of the same opinion. The question is not whether the distress was regular or irregular, but whether there was what amounted to a distress; and it is not necessary to say whether there can be a distress by mere words only; but only whether it will not be a distress if the words are capable of being carried into action. Here the defendant's wife had power instantly to have physically prevented the removal of the piano, had the plaintiffs' men persisted in removing it, and the jury found that she acted bonâ fide and intended to detain the piano for rent.

MELLOR, J., concurred.

Rule discharged.

Attorneys for plaintiffs: *Pike & Son.*
Attorney for defendant: *J. Fraser.*

THE WEST LONDON EXTENSION RAILWAY COMPANY, APPELLANTS; THE ASSESSMENT COMMITTEE OF THE FULHAM UNION, AND THE OVERSEERS OF THE PARISH OF FULHAM, RESPONDENTS.

1870
May 12.

Arbitration—Award—Reference under 12 & 13 *Vict. c.* 45, *s.* 13—*Costs.*

6 QB. 220; 2 QBD. 37

On an appeal to quarter sessions it was ordered, under s. 13 of 12 & 13 Vict. c. 45, that "the matter in dispute" should be referred to arbitration. The arbitrator awarded that the appeal be dismissed, and that the appellants do pay to the respondents their costs of the appeal:—

Held, that, as the order of reference was silent as to costs, the arbitrator had no power to award costs.

AN appeal had been entered at the Middlesex quarter sessions, between the appellants and the respondents, touching a rate made on the 1st of May, 1868, for the relief of the poor of the parish of Fulham. The appeal had been respited from time to time until the 5th of April, 1869, when the court of sessions ordered (1), "with the consent of counsel on both sides, that the matter in dispute between the appellants and respondents shall be referred to John Gray, Q.C., to inquire into and arbitrate thereon, the several parties agreeing and consenting to abide the report of such his arbitration." On the 28th of January, 1870, the arbitrator made his award, and ordered "that the appeal be dismissed, and that the appellants do pay to the respondents their costs of the said appeal, to be taxed by the proper officer of the court of quarter sessions in the usual manner."

A rule was obtained calling on the respondents to shew cause why the award should not be set aside, or so much thereof as awards the payment of costs, or why the award should not be referred back to the arbitrator, on the ground that he had no jurisdiction to award costs.

Huddleston, Q.C., and *Murphy*, shewed cause. The arbitrator had power to award costs. The order of reference puts him in the

(1) Under 12 & 13 Vict. c. 45, s. 13, which enacts, "that it shall be lawful for any court of general or quarter sessions of the peace before which any appeal . . . shall be brought, to order, with the consent of the parties or their attorneys, that the matter or matters of such appeal be referred to arbitration, to such person or persons, and in such manner and on such terms as the said court shall think reasonable and proper. . . ."

1870

WEST LONDON RAILWAY CO. v. FULHAM.

place of the quarter sessions, and as they had power to award costs the arbitrator, inferentially, had the same power. The terms of the order of reference are "the matter in dispute" be referred, and those words include the costs of the appeal. *Reg.* v. *Justices of West Riding* (1), is distinguishable. There the order being silent as to costs, the Court decided that the respondents were not entitled to the costs of the reference and award. It is conceded that the arbitrator had no power over the costs of the reference and award, but he had over the costs of the appeal. In Watson on Awards, 3rd ed. p. 150, it is stated that where a cause is referred, the power of awarding on the costs of the cause is necessarily consequent on the authority conferred upon the arbitrator of determining the cause. So, also, in Russell on Awards, 2nd ed. p. 368, it is said "where a cause alone, or a cause and all matters in difference are referred, and nothing is said in the submission respecting costs, the arbitrator has an implied authority to adjudicate on the costs of the cause." *Roe* d. *Wood* v. *Doe* (2), and *Firth* v. *Robinson* (3), are also authorities on this point. By analogy, on the reference of an appeal where the order is silent as to costs, the costs of the appeal follow the decision of the arbitrator.

[BLACKBURN, J. The sessions have power under s. 13 of 12 & 13 Vict. c. 45, to refer the appeal to an arbitrator "upon such terms as the Court shall think reasonable." *Leggo* v. *Young* (4) and *Bell* v. *Postlethwaite* (5), decided on s. 3 of the Common Law Procedure Act, 1854, which is very nearly in similar terms, are authorities to shew that the arbitrator has no power over costs, unless he is expressly authorized by the terms of the reference.]

Field, Q.C., and *Carter*, in support of the rule, were not heard.

COCKBURN, C.J. This rule must be made absolute, on the ground that the only thing referred by the court of quarter sessions to the arbitrator is "the matter in dispute" between the parties to the appeal. The right to costs is not the necessary consequence of success in the appeal, for by s. 5 of 12 & 13 Vict.

(1) 6 B. & S. 531; 34 L. J. (M.C.) 142.
(2) 2 T. R. 644.
(3) 1 B. & C. 277.
(4) 16 C. B. 626; 24 L. J. (C.P.) 201.
(5) 5 E. & B. 695; 25 L. J. (Q.B.) 63.

1870

WEST LONDON RAILWAY CO. v. FULHAM.

c. 45, the power to grant costs by the court of quarter sessions is discretionary. Therefore it does not follow, that because the matter in dispute is decided one way or the other, the costs will follow the event. I think that where the power to award costs is discretionary in the court of quarter sessions, the order of reference must expressly give the arbitrator power to enable him to award costs. Here the order is silent as to costs. The cases of *Bell* v. *Postlethwaite* (1), and *Reg.* v. *Justices of West Riding* (2), are very nearly in point. But I rest my decision on the ground that it is discretionary, in the matter of an appeal, for the quarter sessions to give costs or not, and that such power was not in terms given to the arbitrator in the order of reference.

BLACKBURN, J. I am of the same opinion. On an appeal to the quarter sessions the Court can give costs at their discretion. Then, by s. 13 of 12 & 13 Vict. c. 45, it is enacted, that "it shall be lawful for any court of quarter sessions, before which any appeal . . . shall be brought, to order that the matter or matters of such appeal be referred to arbitration to such person or persons, and in such manner, and *on such terms*, as the said court shall think reasonable and proper." Therefore, the quarter sessions might make an order ordering in terms either that the costs of the appeal should abide the event of the award, or that the costs of the appeal should be in the discretion of the arbitrator. In this case does the order of reference contain any such terms? The order is, that "the matter in dispute" shall be referred. Words are used out of which I cannot gather, even in a case where the costs would follow the event, an authority to the arbitrator to award them. In *Bell* v. *Postlethwaite* (1) the arbitrator was appointed under s. 3 of the Common Law Procedure Act, 1854, by which a judge has power to order a reference upon such terms as to costs as he shall think reasonable; the rule was silent as to costs, the parties supposing the costs would abide the event; the Court decided that they would not, and that the arbitrator had no power over the costs. I think the present case is stronger, and we cannot say that the quarter sessions gave power

(1) 5 E. & B. 695; 25 L. J. (Q.B.) 63.

(2) 6 B. & S. 531; 34 L. J. (M.C.) 142.

1870

WEST LONDON RAILWAY CO. v. FULHAM.

to the arbitrator to award costs. That being so, he has added something to his award which he ought not to have done.

MELLOR, J. I entirely agree in the conclusion at which the Court has arrived. The quarter sessions have power to refer the question of costs; and if it was intended that one of the terms of the reference should be that the costs were to be in the discretion of the arbitrator, the quarter sessions ought to have framed the order accordingly. As the order is silent as to costs, the arbitrator ought not to have made any award respecting them.

Rule absolute to set aside so much of the award as ordered the payment of costs.

Attorney for appellants: *W. Heggerty.*
Attorney for respondents: *J. Alley Jones.*

April 27.

THE QUEEN, ON THE PROSECUTION OF THE GUARDIANS OF THE STEPNEY UNION, APPELLANTS, *v.* THE INHABITANTS OF ST. GEORGE-IN-THE-EAST, RESPONDENTS.

Poor—Irremoveability by reason of Residence—Removal of Married Woman, in the absence of Husband who has no Settlement—9 & 10 *Vict. c.* 66, *s.* 1, 11 & 12 *Vict. c.* 111, *s.* 1.

A woman, having a settlement in parish L., but having resided for more than a year in parish G., married a foreign sailor having no settlement. They resided together in parish G. until he left in the usual course of his occupation as a sailor, intending to return, but not having made any provision for the wife's maintenance. She continued to reside in parish G., and became chargeable thereto. At this time the husband had not resided one year in the parish:—

Held, that the woman was irremoveable under 9 & 10 Vict. c. 66, s. 1, and 28 & 29 Vict. c. 79, s. 8, by reason of her continuous residence before and during marriage; and that she was not affected by the proviso in 11 & 12 Vict. c. 111, s. 1.

UPON an appeal to the Middlesex quarter sessions against an order of justices for the removal of Margaret Schoder and her child, aged four months, from the parish of St. George-in-the-East to the Stepney Union, the sessions quashed the order on the ground of the irremoveability of the pauper, subject to the opinion of the Court of Queen's Bench on the following case.

Margaret Schoder is the wife of Samuel Schoder; he is a native

1870

THE QUEEN v. ST. GEORGE-IN-THE-EAST.

of Boston, in the United States of America, and has no settlement in England. The order of removal was therefore founded on the maiden settlement of the pauper in the parish of Limehouse in the Stepney Union.

The pauper's husband earns his livelihood as a sailor. She was married to him on the 7th of October, 1867, and on the 21st of the same month, while residing in the parish of St. George, he left her there, and went to sea in the usual course of his occupation as a sailor, but without having made any provision for her maintenance. In the month of May, 1868, she became chargeable to that parish, and continued chargeable to the time of the making of the order of removal on the 24th of September, 1868, at which time her husband had not returned to her, but he returned to her between the date of the order and the time of the appeal.

The pauper's husband had not, at the date of the order of removal, himself resided in the parish of St. George for so long as one year.

Previously to her marriage, the pauper, Margaret Schoder, had resided in the parish of St. George for three years and upwards; and she was at that time irremoveable from such parish by reason of her residence therein under the provisions of 9 & 10 Vict. c. 66, s. 1, 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8. After her marriage, she continued to reside in the same parish up to the date of the order of removal; and she would, if she had remained a feme sole, have then been irremoveable from the parish by virtue of such residence.

The appellants contended that, as the husband was a foreigner without any settlement or place to which he could be removed, Margaret Schoder was not in his absence removeable from the parish of St. George, as she had herself acquired a status of irremoveability by residence therein. And, further, that, as whenever her husband was present with her they would both be irremoveable, she was also irremoveable in his absence until his death or desertion.

The respondents contended that Margaret Schoder, whilst she remained a married woman, lost the status of irremoveability which she had acquired by residence as a feme sole; and that, as her husband had not acquired a status of irremoveability by residence

1870

THE QUEEN v. ST. GEORGE-IN-THE-EAST.

under the provisions of the said statutes, she, in his absence, was removeable to her maiden settlement.

The question for the opinion of the Court was, whether the pauper and her child were irremoveable from the parish of St. George.

G. Tayler, for the appellants. The order of removal was rightly quashed. The pauper was irremoveable by virtue of 9 & 10 Vict. c. 66, s. 1, and 28 & 29 Vict. c. 79, s. 8. (1) The primary object of the legislature was to obviate the hardship of removing persons to a distance after a certain amount of permanent residence in one district. In the present case, the pauper having continuously resided for more than a year is primâ facie irremoveable, as she comes within the enacting part of the statutes; and whatever the proviso, 11 & 12 Vict. c. 111, s. 1, may mean, there can be no doubt that its only object was to prevent the separation of husband and wife, leaving the law otherwise as to irremoveability as it was. In *Rex* v. *Cottingham* (2) a woman, married to a foreigner without a settlement and deserted by him, was held removeable to her maiden settlement; in other words, she was to be treated as if she were unmarried or a widow; and the same principle must apply to a status of irremoveability.

[He also referred to *Reg.* v. *Bennett* (3) and *Reg.* v. *St. Sepulchre.* (4)]

(1) 9 & 10 Vict. c. 66, s. 1:—"No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years [now one year by 28 & 29 Vict. c. 79, s. 8], next before the application for the warrant: . . . Provided always, that whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removeable whenever he or she is removeable, and shall not be removeable whenever he or she is not removeable."

11 & 12 Vict. c. 111, after reciting the 9 & 10 Vict. c. 66, s. 1, at length, and that by reason of the generality of the expressions used in the last proviso, doubts are entertained as to the meaning thereof, and it is desirable to remove such doubts; s. 1 enacts that the said last proviso be repealed, and substitutes: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable notwithstanding any provisions of the said recited Act, and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the said recited Act."

(2) 7 B. & C. 615.

(3) 3 E. & B. 341; 23 L. J. (M.C.) 39.

(4) 1 E. & E. 813; 28 L. J. (M.C.) 187.

Poland (*Poynter* with him), for the respondents. On marriage the wife's status is merged in that of the husband, and she therefore loses her status of irremoveability. In *Much Hoole* v. *Preston* (1) a woman settled in A., and, having lived for more than five years in B. with her husband, an Irishman without a settlement, was deserted by him, and it was held that she was removeable from B. to A.

[BLACKBURN, J. There, the husband had ceased to reside in B.]

In *Reg.* v. *St. Marylebone* (2), where the wife became chargeable during the temporary absence, in the ordinary course of his employment, of her husband, a foreign sailor without a settlement (as here), it was held that the absence of the husband, without leaving the wife means of maintenance, was equivalent to desertion, and that the wife might be removed to her maiden settlement; and Lord Campbell, C.J., says: "There is no hardship in thus removing the wife; when the husband returns to this country he will find her in the parish to which she has been removed, and he may live with her in that parish or in any other." Where husband and wife are living together, no doubt, the principle of the common law was, and of the statutes may be taken to be, that they should not be separated; and this was the reason of the enactment of the proviso in 11 & 12 Vict. c. 111, s. 1, which means that the wife's irremoveability by reason of residence, should depend, not on her own residence, but on the residence of her husband.

[BLACKBURN, J. In *Reg.* v. *Glossop* (3) it was held that the residence of a woman *as a wife* might be counted in estimating the five years residence, under 9 & 10 Vict. c. 66.]

There the woman had become sui juris as a widow, and was within the enacting part of the statute, and the proviso could not apply as she was no longer a wife. But, during coverture, the wife can acquire no status of her own.

[MELLOR, J. She is within the enacting part, unless the proviso, as amended by 11 & 12 Vict. c. 111, applies. But the wife here has a settlement of her own, which may be said, therefore, to be other than her husband's, who has none.]

(1) 17 Q. B. 548; 21 L. J. (M.C.) 1.
(2) 16 Q. B. 352, 356; 20 L. J. (M.C.) 61, 63.
(3) 12 Q. B. 117; 17 L. J. (M.C.) 171.

1870

THE QUEEN v. ST. GEORGE-IN-THE-EAST.

It can scarcely be said that the wife has a settlement other than her husband's, if he has none. Moreover, the words, "having no other settlement than his or her own," applies to the children only; the wife always has the same settlement as her husband.

[HANNEN, J. Except in this very case where the husband has none.]

If it be decided that the wife can acquire a status of irremoveability by her own residence during coverture, irrespective of her husband's residence, the converse must follow, and a wife, becoming chargeable during the absence of her husband, if she has not resided a year, will be removeable, although she may have married a man who has a status of irremoveability.

BLACKBURN, J. The legislature have certainly used language adapted to conceal their intention. But I think I can see my way plainly to saying that the quarter sessions were right in quashing this order of removal. We must consider how the matter stood before the passing of 9 & 10 Vict. c. 66. A person who had got a settlement, if he became chargeable to another parish, might be removed, however long he might have resided in the other parish, to his place of settlement; and if he were married, his settlement became his wife's, so that both could be removed to his place of settlement. But if a person had not acquired a settlement, he could not be removed; therefore, if the husband had no settlement, and the wife had one, and they were residing together, neither could be removed, the principle being that husband and wife should not be separated; but when the husband was de facto separate from the wife, and she became chargeable, she could be removed to her maiden settlement. Then came 9 & 10 Vict. c. 66:—[the learned Judge read s. 1, and the proviso]. That proviso was repealed by 11 & 12 Vict. c. 111, s. 1, and was re-enacted in the following words:—[the learned Judge read the section]. The question is, what is the meaning of this proviso? Mr. Poland asks us to read the words "having no other settlement than his or her own," as applying to children only, and not applying to a wife; but it is clear that we cannot so confine the words. The whole sentence must be taken together, and grammatically, the words must apply to a wife as well as children; and so reading them, the legislature, in the enactment and proviso, would seem to say this: In establishing the status of

irremoveability, we leave the common law principle untouched, that husband and wife shall not be separated, and therefore when the husband has a settlement, and is removeable, the wife, though she has resided sufficiently long to have become irremoveable, shall be removed with him; and vice versâ, if the husband is irremoveable, neither shall the wife be removed; but if the wife has a settlement, and the husband has no settlement, we say nothing as to when the wife is to be removed to her own settlement. This, therefore, would seem to leave a wife, whose husband had no settlement and has left her, but who has acquired a status of irremoveability by her own personal residence, within the enactment and not within the proviso. In *Reg.* v. *Glossop* (1) it was held that a woman, who had resided for five years continuously as wife and widow in the same parish, had acquired a status of irremoveability by actual residence, although part of the residence was when she was a wife. That is applicable to the present case, and shews that the residence as wife may be united with the residence before marriage, and as the residence was continuous up to the time of receipt of relief, I cannot see why she is not within the enacting part of the statute. But it is said the wife falls within the proviso, because the husband had not resided a year before the relief was given. If he had a settlement, no doubt, the wife would be removeable to his place of settlement. But I am at a loss to see in that any foundation for the argument that, (the husband being irremoveable in point of fact if he were here with his wife, because he has no settlement,) he not being here, you are to send the wife—notwithstanding her long residence—away from her husband's and her own place of residence to her place of settlement, merely because he has not resided a year. Whether the legislature had this case in their contemplation, or not, may be doubtful; but if they had intended to leave this case within the operation of the enacting part and out of the proviso, they would, as it seems to me, confine the proviso, as they have done, to the case of a wife having no settlement other than her husband's, and thus forbid her being taken away from the place of residence of her husband, although he may happen for the time to be absent from her. If, on the other hand, we were to adopt the construction Mr. Poland

(1) 12 Q. B. 117; 17 L. J. (M.C.) 171.

1870

THE QUEEN v. ST. GEORGE-IN-THE-EAST.

invites us to adopt, and to say that a married woman, under the present circumstances, could be removed, this iniquitous consequence would follow: that a woman living as a man's mistress would acquire the privilege of becoming irremoveable from his place of residence during his temporary absence, whereas the wife would have no such privilege, and would be removeable to her own place of settlement if the husband had no settlement, as was decided in *Reg.* v. *St. Marylebone* (1), independently of 9 & 10 Vict. c. 66. As to the case put of a husband with a status of irremoveability and a wife without it, and the wife becoming chargeable in the husband's absence, it is sufficient to say, that if the consequences suggested follow, it would involve hardship; but we must deal with such a case if it should arise, and we need not now say how it ought to be decided; probably, however, the law may be altogether altered before it does arise.

MELLOR, J. We must look at the policy of the Acts of Parliament, which was to prevent the oppression of removing a person from the place in which he had resided a considerable time (formerly five years, now one year), and breaking up all the associations and acquaintances he had made in that place; and I must see my way very clearly before I arrive at a decision which would interfere with a policy so consistent with humanity; and where a woman, who has acquired a status of irremoveability, marries a man, who has not acquired this status, and has no settlement, but resides with her until, in the exercise of his ordinary calling, he goes away, intending to return, I cannot help thinking we should act in direct violation of this principle were we to decide that, on becoming chargeable, she was removeable by reason of this proviso. I entirely agree that both provisos are somewhat unintelligible; but I think the most sensible construction to put upon the statutes is that which my Brother Blackburn has suggested.

HANNEN, J. I have only to say that I can see no reason for disturbing the decision of the quarter sessions.

Order of sessions affirmed.

Attorney for appellants: *W. H. Swepstone.*

Attorneys for respondents: *Stone, Townson, & Morris.*

(1) 16 Q. B. 352; 20 L. J. (M.C.) 61.

THE QUEEN, on the Prosecution of THE GUARDIANS OF THE EXETER UNION, Appellants; *v.* THE GUARDIANS OF THE SAINT THOMAS UNION, Respondents. 1870 *April* 30.

Poor—Settlement by Paying Public Taxes of Parish—3 Wm. & Mary, c. 11, s. 6—Borough Improvement Rate and Lamp Rate.

Under a local Act, commissioners were authorized to levy rates for paving and lighting the streets, &c., within the city of E., on the several owners and occupiers of all houses within the city. The commissioners were empowered to appoint two or more of the inhabitants of each parish in the city to be assessors of the rates, and the assessors were required to make the rates and the commissioners were to settle and sign the same. The commissioners were also to appoint the overseers of the respective parishes to collect the rates. The rates were made and collected in each parish by the assessors and collectors as required by the Act. T. occupied a house in a parish in the city for one year, at a yearly rent above 10*l.*, and paid his share of the rates made under the local Act:—

Held, that these rates were public taxes of the parish within the meaning of 3 Wm. & Mary, c. 11, s. 6, and that T. had acquired a settlement in the parish.

On an appeal to the Devonshire Quarter Sessions against an order for the removal of Ann Tupman and her seven children from the St. Thomas Union to the union of the city of Exeter (the parish of St. Sidwell, in the last-mentioned union, being adjudged to be the place of their last legal settlement), the sessions quashed the order, subject to the following case.

The paupers are the widow and legitimate children of W. H. Tupman, deceased, who died in a house occupied by him and his family in the parish of St. Sidwell, on the 1st of October, 1868. Shortly after the death of Tupman, the paupers went to reside in the respondents' union. The order of removal appealed against was made on the 29th of January, 1869.

Tupman bonâ fide rented a tenement, viz., the house in which he died, which consisted of a separate and distinct dwelling house in the parish of St. Sidwell, at a larger sum than 10*l.* a year for the whole term of one year, viz., from Michaelmas, 1867, to Michaelmas, 1868. The house was occupied by Tupman and the paupers during the whole of the year, under the yearly hiring, and the rent of the same, to the amount of 10*l.*, was actually paid for the term of one whole year.

Tupman was duly assessed to the poor rate, but d'd not himself pay the same in respect of the tenement for one year.

1870

THE QUEEN v. ST. THOMAS.

In the month of July, 1868, Tupman paid his share which was demanded of him and for which he was liable, towards the improvement rate and lamp rate, levied as hereinafter stated, for the parish of St. Sidwell, in respect of his occupation of the house.

The Court of Quarter Sessions held that Tupman did not acquire a legal settlement in the parish of St. Sidwell, on the ground that the improvement rate and lamp rate were neither of them public taxes or levies of the town or parish which Tupman inhabited within 3 Wm. & Mary, c. 11, s. 6 (1), nor parochial rates within 6 Geo. 4, c. 57, s. 2. (2)

The improvement and lamp rates are distinct rates, and are levied under the authority of 2 & 3 Wm. 4, c. cvi., entitled an Act for better paving, lighting, watching, cleansing, and otherwise improving the city of Exeter.

S. 2 provides for the appointment of commissioners, to consist of six members of the common council, the dean and canons residentiary of the cathedral, and also of persons to be elected by each parish and precinct within the city and county of the city, as provided in the 4th section.

S. 4 is in the following words: "And be it further enacted, that the commissioners for the execution of this Act to be hereafter appointed, shall be elected by the parishioners and inhabitants of the several parishes and precincts within the city of Exeter, and every such parish or precinct respectively, shall, from time to time, be entitled to appoint such person or persons to be commissioners of this Act as together with the Commissioners for the time being acting for such parish or precinct respectively, by virtue of the said recited Act, and this Act will make up the number of commissioners which such parish or precinct respectively shall be entitled to appoint, according to the following scale (that is to say)":—[Then followed a scale which is unimportant to the present question].

By s. 7, provision is made for the notice and mode of electing commissioners.

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(1) 3 Wm. & Mary, c. 11, s. 6, "that if any person who shall come to inhabit in any town or parish . . . shall be charged with and pay his share towards the public taxes or levies of the town, or parish there, he shall be adjudged and deemed to have a legal settlement in the same. . . ."

(2) 6 Geo. 4, c. 57, s. 2:—"No person shall acquire a settlement in any parish or township maintaining its own poor, by or by reason of settling upon, renting, or paying parochial rates for any tenement, not being his or her own property, unless such tenement shall consist of a separate and distinct dwelling house or building, or of land, or of both, bonâ fide rented by such person in such parish or township, at and for the sum of 10*l.* a year at the least, for the term of one whole year; nor unless such house, or building, or land, shall be occupied under such yearly hiring, and the rent for the same to the amount of 10*l.* actually paid for the term of one whole year at the least. . . ."

1870

THE QUEEN v. ST. THOMAS.

By ss. 40—135, the commissioners are empowered to pave and light the streets of Exeter, and provide for watchmen and water pipes.

S. 136:—"And for raising, securing, and paying money to answer and defray the several purposes of this Act, and to defray the charges and expenses of soliciting, obtaining, and passing this Act, or a proportion thereof (other than and except for the purpose of lighting the said city), the said commissioners shall, and they are hereby authorized and required once in every year to, rate and assess by a just and equitable pound rate or assessment, under the name of the Exeter Improvement Rate, the several landowners and owners, and the several tenants and occupiers of all houses, buildings, gardens, tithes, and other hereditaments within the said city in sums not exceeding certain sums therein mentioned."

S. 139:—"The charges and expenses of lighting, setting up, fixing, providing, maintaining and repairing the lamps by this Act directed to be set up for the purpose of lighting the said streets, ways, passages, and parishes, liberties, suburbs and precincts of the said city, and for otherwise putting this Act into execution in any manner touching and concerning the lighting the said city, shall be at all times borne, and paid, and defrayed by the tenants or occupiers of all houses, buildings, lands, tithes, and other hereditaments within the city of Exeter; and for that purpose the said commissioners shall, and they are hereby authorized and empowered, and required from time to time, once in every year, to rate and assess by a just and equal pound rate or assessment, under the name of 'The Exeter Lamp Rate,' all the tenants or occupiers of all houses, buildings, lands, tithes, and other hereditaments within the said city in respect thereof, at amounts therein limited."

S. 141:—"It shall be lawful for the said commissioners as often as they shall see occasion, to appoint two or more of the inhabitants of the city, or of each parish, precinct, or ward, within the said city, to be assessors of such rates and assessments, and such assessors are required to make such rates and assessments from time to time accordingly, . . . and to deliver to the commissioners two copies of the rates and assessments made in the manner and according to the form directed by the said commissioners and subscribed by such assessors. . . . And the said commissioners shall, as soon as may be, after such rate and assessment shall be made and delivered to them by such assessors, settle and sign the same, and cause a duplicate thereof, also signed by them, to be delivered to the collectors to be appointed in that behalf." A penalty of 10*l.* is imposed on persons appointed assessors and refusing to take the office; such penalty, when levied, to be paid to the treasurers or treasurer of the said commissioners, to be applied to the purposes of the said Act.

S. 142:—"No person who shall have served the office of assessor, shall be compellable to serve again for three years, except with the consent of a vestry meeting of any parish in respect of which any such assessor shall be appointed."

S. 150:—The commissioners are required yearly to appoint the churchwardens and overseers of the poor of the respective parishes, or such other persons as the commissioners shall appoint to be collectors of the said rates and assessments; and all the said rates shall be paid to the said collectors by the respective tenants or occupiers of houses, &c.

The improvement and lamp rates were from time to time made for the parish of St. Sidwell by assessors appointed by the com-

1870

THE QUEEN v. ST. THOMAS.

missioners in pursuance of the powers given to them by the local Act, and such rates were collected by persons appointed as collectors by the commissioners by virtue of the Act.

The improvement rate for the parish of St. Sidwell from Lady Day, 1867, to Lady Day, 1868, was produced in evidence. From the heading it appeared that the rate was a rate on the several landlords and owners, and the several tenants and occupiers, of 1*s.* in the pound on the annual rent or value of all houses, &c., situate within the parish of St. Sidwell, in the city of Exeter, made in pursuance of 2 & 3 Wm. 4, c. cvi. The rate was signed by two assessors, and settled and signed by five commissioners.

The heading to the lamp rate was similar to that to the improvement rate.

The question for the opinion of the Court was, whether either the improvement rate or lamp rate was a public tax or levy, or a parochial rate, within 3 Wm. & Mary, c. 11, s. 6, and 6 Geo. 4, c. 57, s. 2.

Anderson, and *Mackey*, for the appellants. The payment of these rates by Tupman conferred no settlement. The rates are not public taxes, nor are they parochial rates; they are levied under a local Act for the improvement of the city of Exeter, and they are required to be levied on the occupiers of all houses within the city. The reason why a settlement is gained by payment of parochial rates is, because of the notoriety of the residence in the parish of the person who makes the payment; but here the rate is levied not on the parish, but on the city, and is collected by persons appointed by the commissioners under the local Act, and not by the parochial authorities. It is not, therefore, a parish rate, and the parish had no notice that Tupman was a parishioner: *Rex* v. *Christchurch* (1); *Rex* v. *Axmouth*. (2) The respondents, no doubt, will rely upon the cases of *Reg.* v. *Everton* (3), and *St. George, Hanover Square* v. *Cambridge Union*. (4) Those cases, however, were decided upon the authority of *Rex* v. *Bramley* (5), in which case it was held that the payment of the land tax

(1) 8 B. & C. 660.
(2) 8 East, 383.
(3) 2 E. & E. 771; 29 L. J. (M.C.) 165.
(4) Law Rep. 3 Q. B. 1.
(5) Bur. Set. Ca. 75.

conferred a settlement; but a land tax is an imperial tax, and therefore a public tax, while in this case the rates are local rates levied for local purposes.

Sir J. B. Karslake, Q.C., and *McKellar*, for the respondents, were not heard.

BLACKBURN, J. I think the order of sessions was wrong. The rates, though they are to be applied over the whole city, are to be levied in each parish separately. By s. 141 the commissioners have the option of appointing two or more of the inhabitants of each parish to be assessors of the rates, and the assessors are required to make the rate, and the commissioners, after the rates have been made, are to settle and sign the same. By s. 150 the commissioners have the option of requiring the rates to be collected by the overseers of each parish. The commissioners have chosen to exercise the option given them by these two sections, and the rate has been made and collected in each parish separately. The question is, whether the payment of these rates constitutes the payment of a public tax within the meaning of 3 Wm. & Mary, c. 11. s. 6. In *Rex* v. *Bramley* (1), Lord Hardwicke says that "the great doubt has been whether the legislature did not mean parochial taxes. But this has long been gotten over; and the land tax has been holden to be within the Act, from the notice of inhabitancy that arises by the parties being assessed and paying it." The question, then, is, whether the assessment and payment of these taxes is the same as the assessment and payment of the land tax. Mr. Anderson contended that there is a distinction between an imperial tax like the land tax levied on each parish separately and a local tax levied in the same manner. I cannot see any such distinction. If anything, an imperial tax would be less in the nature of a public tax in the parish than a local tax would be; but where a rate has been levied on the parish, then it is within the Act, as the effect of levying it must be to give notice of inhabitancy. It is not essential that the officer who collects it should be appointed by the parish. The land tax is not collected by officers appointed by the parish. In *Reg.* v. *Everton* (2) the

(1) Bur. Set. Ca. at p. 76.
(2) 2 E. & E. 771; 29 L. J. (M.C.) 165.

1870

THE QUEEN v. ST. THOMAS.

doubt was whether, as the rate was levied on the township, it could be a parochial rate. The case of *Reg.* v. *Christchurch* (1) is also distinguishable. There the watch rate was levied in a particular ward of the parish, and its payment was held to confer no settlement, because it was not levied in the parish so as to be a public rate of the parish. Those cases do not apply here, because these rates were levied on the whole parish, and consequently were parochial rates in that sense.

MELLOR, J. I am of the same opinion. The question is, whether the deceased was charged with his share towards the public taxes of the town or parish? It is found as a fact that he was charged to and paid the assessment in respect of the lamp and improvement rates. I think that is sufficient to constitute a settlement within the meaning of the cases on the subject. The rates are, to some extent, so far as the present question is concerned, analogous to the land tax. That tax was charged upon the hundreds and divisions, though the assessment has to be made in each parish. It was not assessed or collected by parish officers; the persons collecting it were to be able and sufficient persons appointed by the commissioners. It appears to me that the cases entirely support our decision, and I think we have sufficient reason for saying that this was a public tax of the parish, and that the paupers have, therefore, acquired a settlement.

LUSH, J. I am of the same opinion. That this was a public tax I never entertained the slightest doubt. The purpose for which it is made is the improvement of the whole city of Exeter. If it is a tax for the improvement of the whole city, à fortiori it must be for the improvement of any particular parish within the city. The only question on which I had any doubt was, whether it could be said to be a public tax *of the parish;* because that is essential. It is sufficiently clear that the inhabitants of the parish would know by the rate itself who are the inhabitants of the particular parish. On looking at s. 141, and the very large powers which the commissioners had by that section, I have come to the conclusion that the commissioners had the power to make a

(1) 8 B. & C. 660.

parochial tax, and to require two inhabitants of each parish to make the rates accordingly, and that is what they have done, and they have appointed two persons to collect it for each particular parish. I think the tax is public in its nature, and a tax in the particular parish.

1870

THE QUEEN v. ST. THOMAS.

Order of sessions quashed, and the order of justices affirmed.

Attorney for appellants: *J. E. Fox, for H. W. Hooper, Exeter.*
Attorney for respondents: *G. F. Cooke.*

THE QUEEN *v.* HULME.

May 5.

Corrupt Practices Prevention Acts—(15 & 16 *Vict. c.* 57, *ss.* 9 *and* 10; 26 & 27 *Vict. c.* 29, *s.* 7)—*Information for Bribery—Certificate of Commissioners to Witness—Staying Proceedings.*

The defendant was examined as a witness before the commissioners appointed to inquire into the existence of corrupt practices at an election of members to serve in Parliament for the city of N., and received from the commissioners a certificate under s. 7 of 26 & 27 Vict. c. 29, which certified that the defendant was sworn and examined on oath before the commissioners, "and upon such examination was required by us to answer questions his answers to which criminated or tended to criminate him, and answered all such questions; but divers of his said answers to the said questions were unsatisfactory to us, and we believe were false, and false to his knowledge." The defendant was afterwards convicted on a prosecution for bribery, and obtained a rule to stay proceedings under s. 7:—

Held, that the defendant to entitle him to a certificate must make true answers to all questions; that the commissioners had in effect refused to certify that the defendant's answers were true, and that the certificate was not such as s. 7 required, and did not operate as a stay of proceedings.

RULE, calling on the prosecutor to shew cause why all proceedings on the information filed on this prosecution should not be stayed, and why the Court should not award to the defendant the costs to which he had been put in such information, pursuant to 26 & 27 Vict. c. 29, s. 7, and why judgment should not be entered for the defendant.

It appeared from the affidavits that certain commissioners having been appointed for the purpose of making inquiry into the existence of corrupt practices in the last election of members to

1870

THE QUEEN v. HULME.

serve in Parliament for the city of Norwich, the defendant was called as a witness, and examined upon oath before such commissioners. An application was then made to the commissioners by the defendant for a certificate under s. 7 of 26 & 27 Vict. c. 29, on the ground that the answers which he had given to the questions asked by the commissioners, criminated or tended to criminate him. The commissioners gave the defendant a certificate as follows: "We . . . do hereby certify that J. H. Hulme was sworn and examined upon oath before us, and upon such examination was required by us to answer questions (1) which criminated or tended to criminate him, and answered all such questions; but divers of his said answers to the said questions were unsatisfactory to us, and we believe were false, and false to the knowledge of him the said J. H. Hulme. 15 February, 1870."

In consequence of the evidence given by the defendant and others at the inquiry before the commissioners, the Attorney General filed an ex officio information for bribery against him. The information came on for trial before Byles, J., at the last spring assizes at Norwich, when, on the arraignment of the defendant, an application was made to the judge to stay the proceedings on the production and proof of the certificate. The judge, after consultation with Blackburn, J., intimated that the application should be made to the Court of Queen's Bench. (2)

The trial then proceeded, and the defendant was convicted.

(1) See post, p. 386.

(2) The following statutes were referred to in the argument:

15 & 16 Vict. c. 57, s. 9:—"For the more effectually prosecuting any inquiry under this Act, every person who has been engaged in any corrupt practice at or connected with any election of members or a member to serve in Parliament for any county, division of a county, city, borough, university, or place to which any inquiry under this Act relates, and who is examined as a witness, and gives evidence touching such corrupt practice before the commissioners appointed under this Act to make such inquiry, and who, upon such examination, makes a true discovery to the best of his knowledge touching all things to which he is so examined, shall be freed from all penal actions, forfeitures, punishments, disabilities, and incapacities, and all criminal prosecutions to which he may have been or may become liable or subject at the suit of Her Majesty, her heirs or successors, or any other person, for anything done by such person or persons in respect of such corrupt practice; and no person shall be excused from answering any question put to him by such commissioners on the ground of any privilege, or on the ground that the answer to such question will tend to criminate such person,"

1870

THE QUEEN v. HULME.

Sir R. P. Collier, A. G., Sir J. D. Coleridge, S. G., O'Malley, Q.C., Metcalfe, and *Archibald,* shewed cause. The question is, whether the document granted by the commissioners is a certificate within s. 7 of 26 & 27 Vict. c. 29. The argument on the other side is founded on the difference in the language in ss. 9 & 10 of 15 & 16 Vict. c. 57, and s. 7 of 26 & 27 Vict. c. 29. Under s. 9 of the

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s. 10:—"Where any witness is so examined as aforesaid, such witness shall not be indemnified under this Act unless he receive from such commissioners a certificate in writing under their hands, stating that such witness has, upon his examination, made a true disclosure touching all things to which he has been so examined; and if any action, information, or indictment be at any time pending in any court against any person so examined as a witness in manner above mentioned, for any corrupt practice at any election to which the inquiry made by such commissioners had reference, such court shall, on the production and proof of such certificate, stay the proceedings in any such action, information, or indictment, and may, in its discretion, award to such person such costs as he may have been put to by such action, information, or indictment."

26 & 27 Vict. c. 29, s. 7:—"No person who is called as a witness before any election committee, or any commissioners appointed in pursuance of the Act, 15 & 16 Vict. c. 57, shall be excused from answering any question relating to any corrupt practice at, or connected with, any election forming the subject of inquiry by such committee or commissioners, on the ground that the answer thereto may criminate or tend to criminate himself: Provided always, that where any witness shall answer every question relating to the matters aforesaid which he shall be required by such committee or commissioners (as the case may be) to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive from the committee, under the hand of their clerk, or from the commissioner, under their hands (as the case may be), a certificate stating that such witness was, upon his examination, required by the said committee or commissioners to answer questions or a question relating to the matters aforesaid, the answers or answer to which criminated or tended to criminate him, and had answered all such questions, or such question, and if any information, indictment, or action be at any time thereafter pending in any court against such witness for any offence under the Corrupt Practices Prevention Acts, or for which he might have been prosecuted or proceeded against under such Acts, committed by him previously to the time of his giving his evidence, and at or in relation to the election concerning or in relation to which the witness may have been so examined, the court shall, on production and proof of such certificate stay the proceedings in such last-mentioned information, indictment, or action, and may, at its discretion, award to such witness such costs as he may have been put to in such information, indictment, or action: Provided that no statement made by any person in answer to any question put by or before such election committee or commissioners shall, except in cases of indictments for perjury, be admissible in evidence in any proceeding, civil or criminal."

1870

THE QUEEN v. HULME.

first Act a witness, examined before commissioners, who makes a "true discovery" touching all things to which he is examined, is freed from all criminal prosecutions, and by s. 10 he is to receive a certificate stating he has made a "true disclosure." The language of s. 7 of 26 & 27 Vict. is different; to entitle a witness to receive a certificate, the witness shall answer every question which he shall be required by the commissioners to answer. It will be contended, on the other side, that under the first Act the witness to be entitled to his certificate is to make a true discovery, but under s. 7 of the later Act, if he answer the questions, however false and misleading the answers may be, still he is entitled to his certificate. This argument is a reductio ad absurdum. It never could have been the intention of the legislature that on an inquiry to elicit the truth, and where the witness is sworn to speak the truth, he should receive immunity for answering falsely. The difference between the two Acts is this: under the earlier Act the witness had, on his own responsibility, to make a voluntary discovery before he was entitled to his certificate; under the later Act, he is to answer every question put to him by the commissioners. The stringency of the condition on which he is entitled to his certificate under the first Act is therefore mitigated by the second Act, but nevertheless, under each, the witness must make a true discovery or make true answers; answer must mean true answers, for it never could be intended that a witness who answered falsely, with a view to defeat the inquiry, should be entitled to his certificate. The certificate states, in effect, that the defendant has not made true answers to the questions put to him by the commissioners, and is therefore not such a certificate as s. 7 contemplates.

Bulwer, Q.C., and *Mayd*, in support of the rule. The object of the legislature in passing the statutes in question, was not to punish, nor to obtain evidence to criminate, individuals, but to ascertain the political morality of the constituency, and with that view to get the criminals themselves, the only persons generally who can give the requisite information, as witnesses before the commissioners. Accordingly, in the first place, extraordinary powers are conferred upon the commissioners. By 15 & 16 Vict. c. 57, s. 8, they are empowered to summon any persons whomsoever before

them, who *shall* attend and *shall* answer all questions touching the matters to be inquired into; and (s. 12), "if any person summoned shall refuse to answer, the commissioners may commit him to prison," and (s. 13) if he wilfully gives false evidence, he is liable to the penalties of perjury. Not only are the commissioners unfettered by any rules of law or evidence in conducting the inquiry, but the witnesses are deprived of their common law privilege of refusing to criminate themselves. It is obvious that no one implicated in corrupt practices would, under these conditions, give evidence if he could avoid it, and that the object of the inquiry would, to a great extent, be frustrated. The legislature, therefore, in ss. 9 and 10, provided some protection to a witness, by enacting that if, upon his examination, he made a true discovery to the best of his knowledge, touching all things to which he was examined, he should be freed from, inter alia, all criminal prosecutions; but not unless the commissioners gave him a certificate that he had "upon his examination made a true disclosure touching all things to which he had been examined." Upon the part of the Crown it is argued, that a witness, under these sections, was not entitled to be indemnified unless he volunteered to give all the information he possessed, whether he was asked or not. But, in the first place, the legislature could never have supposed, contrary to all experience, that any criminal would voluntarily make himself out to be worse than he could help; and, secondly, the language of both the 9th and the 10th sections points to a disclosure or discovery, made on what is both legally and popularly known as an examination, that is, an inquiry conducted by means of question and answer. In the course of time it was found that to require a "true disclosure in all things" was too stringent a provision, for it is difficult in any investigation to get the truth without some admixture of falsehood. The discretion also vested in the commissioners as to granting certificates was found to be too wide, and the protection to witnesses too slight, and it may have been thought that they would be more likely to tell all they knew if they had nothing to fear or to hope from the commissioners. In truth, the legislature were treating with criminals, and found that the inducements held out to them to criminate themselves and to betray their accomplices, were not sufficiently strong. Accordingly, these sections

1870

THE QUEEN v. HULME.

(9 and 10) were expressly repealed by 26 & 27 Vict. c. 29, s. 10, and s. 7 substituted for them. What is now required is not "a true discovery," nor a "true disclosure," but "an answer," and a witness must answer at his peril. An answer is not the less an answer because it is false. It may be true, or it may be false, or partly true and partly false. If "true" is inserted before the word "answer," not only is the language of the section altered, but an epithet is inserted which (on comparison with the previous Act), the legislature have advisedly left out. Still less are you to insert "true to the belief of the commissioners," which is what it is sought to insert in the present case. But, further, the later statute, which it is admitted was passed to give greater protection to witnesses, is thus construed to afford them less protection; for instance, suppose a witness were to answer falsely at first, but, on being pressed, he were to tell the truth; under 15 & 16 Vict. c. 57, he would be entitled to a certificate, as having made a true disclosure; but under 26 & 27 Vict. c. 29, s. 7, the commissioners might in such a case say truly, in the language of this certificate, that divers of his answers were false, and so deprive him of an indemnity. The reason for the change in the law is to be found in the fact that the legislature are holding out inducements to criminals to submit themselves to examination, and they trust to the unlimited inquisitorial powers conferred upon the commissioners to get at the truth. They may also have reasonably supposed that a man, though he had been guilty of bribery, might still respect his oath, and still more have some dread of being prosecuted for perjury. It is enough to say that the section does not require that every answer should be true. In the present case, the commissioners do not say that the defendant gave false answers, but only that divers of his answers were unsatisfactory, and, as they believe, false. It may be, that their belief was unfounded and that the answers were, in fact, true; and a witness is not bound to answer to the satisfaction of the commissioners. If the commissioners had thought that the defendant was not entitled to a certificate, they ought to have refused it; but as they have given him one, stating in the language of the Act that he did answer all questions, the Court will so construe it as to make it valid, and reject the statement of the commissioners' belief as surplusage. The commissioners, in effect, say, "we give an in-

demnity, but, nevertheless, we think the defendant ought not to be indemnified." The maxim, utile per inutile non vitiatur, applies.

1870

THE QUEEN v. HULME.

The Attorney-General claimed a right to reply, but did not exercise it.

BLACKBURN, J. In this case a rule has been obtained to stay proceedings on this prosecution, on the production of a certificate signed by the commissioners appointed to inquire into the existence of corrupt practices at the last election for Norwich. There can be no doubt that if the certificate is such as the statute requires should be granted, the Court is bound to stay proceedings. The question which arises is, whether or not the certificate furnished is such a certificate as the statute contemplates. Under s. 9 of 15 & 16 Vict. c. 57, it was provided that, for the more effectually prosecuting any inquiry, every person having been engaged in corrupt practices at any election of members who gives evidence touching such corrupt practices before the commissioners appointed under the Act to make such inquiry, and who upon such examination makes a *true discovery* to the best of his knowledge touching all things to which he is examined, shall be freed from all penal actions, &c.; and it was provided in s. 10, that where a witness is so examined, such witness shall not be indemnified under this Act, unless he receive from such commissioners a certificate in writing, under their hands, stating that such witness on his examination made a true disclosure. It is plain enough, in construing this Act, that where a person had been examined he was bound to make a true discovery to the best of his knowledge; and, moreover, when he had done that, he had no protection unless he obtained from the commissioners a certificate which, on the wording of those sections, it was discretionary with the commissioners to give or to refuse. Then the legislature passed another statute which repealed these two sections, and substituted another enactment in their place. By 26 & 27 Vict. c. 29, s. 7, it is provided that "no person who is called as a witness before any commissioners appointed in pursuance of 15 & 16 Vict. c. 57, shall be excused from answering any question relating to any corrupt practice at any election forming the subject of inquiry by such commissioners, on the ground that the answer thereto may criminate,

1870

THE QUEEN v. HULME.

or tend to criminate, himself." That enactment, so far as it goes, has an obvious and intelligible object. The election committees, or the judges, or the election commissioners, must make their inquiries amongst persons who are generally expected to be hostile witnesses, and unwilling to tell the truth, and who, if the common law had been left untouched, by which a person might refuse to answer any question tending to criminate himself, would be always entitled to say, "I will answer no such question," and so the inquiry would be baffled. Therefore, the legislature, with great policy, enacted that the tendency of the answer to expose the witness to a criminal charge should be no excuse for his not answering the question. At common law the witness is entitled to refuse to answer a question that may tend to criminate him, not only because the answer itself might be evidence against him on a criminal charge, but because it might furnish a link in the chain of testimony which might implicate him in such a charge. Those who decided the common law, originally, thought it was unwise and unjust to make a man, however guilty, criminate himself. The legislature, having taken away from the witness that common law privilege, gives him an immunity by enacting "that where any witness shall answer every question relating to the matters aforesaid, which he shall be required by such committee or commissioners to answer, and the answer to which may criminate or tend to criminate him, he shall be entitled to receive a certificate" which is to operate as a stay of proceedings in certain cases.

The question that arises here is, what is the condition upon which the defendant is entitled to a certificate? This Court has already determined that the meaning of this enactment is, that if the witness has really done what the Act requires, he is entitled to a certificate, and the commissioners have no right to refuse it.

The condition in the present statute, upon which the witness is entitled to a certificate, is: "Where any witness shall answer every question relating to the matter aforesaid." Does that mean—which is the contention on behalf of the defendant—if he shall give an answer in fact, though it may be false to his knowledge; though it may be palpably false to the knowledge of every person who stands by; though it may be a matter of ridicule, and turning the whole commission and inquiry into contempt, can it be in-

tended that if the witness gives an answer which is transparently false, he should get the immunity, but that he should be liable to be indicted for perjury?

If the witness answers the question, "Did you bribe?" and says, "I did commit bribery," a matter, probably, which everybody would know; "I did commit bribery, and I did give money to various voters, to vote for one of the candidates." And then when he is asked, "Where did you get the money from?" answers, with bold impudence, "I got it from the head of the opposite party," every one would see at one glance that was a lie, and a lie for the purpose of baffling the inquiry; but it would be exceedingly difficult to prove by two witnesses that it was not true. There would be no one but the party who was said to have advanced the money to swear that he did not give it; and it would be impossible to convict of perjury. If the witness makes such an answer as that, an answer, de facto, which everybody would know was a false answer, and for which it would be almost impossible to punish him, can the legislature have intended to say that he is to be entitled to obtain an immunity from all proceedings for bribery? I think the legislature intended no such thing. I think it is clear that whenever the legislature in this Act requires a person to answer questions, the meaning is that he shall answer them truly, to the best of his knowledge and belief; it is clear also in this Act that where the witness gives false evidence in answer to any question, he shall be liable to be indicted for perjury. I think it is clear the obligation intended to be thrown upon the person who is called as a witness is, that he shall answer every question truly to the best of his knowledge and belief. I have given careful consideration to this section, and have come to the conclusion that it does mean that "the answer" must be a true answer. The present application is as if to an application for a mandamus, to compel the commissioners to grant the defendant a certificate, the return to that mandamus had stated that he had answered in fact, but that he had answered falsely to his knowledge; if, on demurrer to that return, it was decided that the answers were false to his knowledge, could the Court be asked then to award a peremptory mandamus, entitling the witness to an absolute immunity from all proceedings for bribery? If an answer de facto is a sufficient answer according

1870

THE QUEEN v. HULME.

to the Act, a peremptory mandamus would be granted; but if an answer which is true is required, then the peremptory mandamus could not be asked for. I think that "answer," within the meaning of s. 7 of 26 & 27 Vict. c. 29, means "a true answer."

The other question is simpler. The certificate is in these terms: "We do hereby certify that J. H. Hulme was sworn and examined upon oath before us as such commissioners, and upon such examination was required by us to answer questions which criminated or tended to criminate him;"—it is admitted that the certificate must be read thus: "to answer questions, the answers to which tended to criminate him;"—"and answered all such questions, but divers of his said answers to the said questions were unsatisfactory to us, and we believe were false, and false to the knowledge of him the said J. H. Hulme." The question is whether a certificate which states that the defendant made answers to questions, which answers the commissioners believe were false, and false to his knowledge, is such a certificate in substance and effect as the statute requires. If the statute means, as I think it does mean, that the commissioners are to certify that he gave true answers, I think it is not such a certificate as the statute requires. According to our decision in *Lovibond's Case*, the opinion formed by the commissioners is not final or conclusive, but may be reviewed by this Court. But when the commissioners are required to certify that the witness gave answers, meaning true answers, and they give a certificate that he gave answers, but they proceed in the same sentence to say, "but we believe that those answers were false, and false to his knowledge," it is a refusal to certify that the answers were true. It would have been a great deal better if the commissioners, believing the answers to be false answers, had refused to give the defendant a certificate, and left him to seek such a remedy in this Court as he thought fit. Construing s. 7 of 26 & 27 Vict. c. 29, to mean that the certificate should be a certificate shewing that, in the opinion of the commissioners, the defendant had given true answers, I think this certificate is no certificate, and cannot operate as a stay of proceedings; and, therefore, the rule should be discharged.

MELLOR, J. I am of the same opinion, and only desire to add one or two observations to what has been said. The question

turns on two Acts of Parliament, and we must consider that the 7th section of 26 & 27 Vict. c. 29 is substituted for the 9th and 10th sections of 15 & 16 Vict. c. 57, and we must deal with it as if it had been incorporated in that Act. If we look at the object for which the commission was to issue, and the powers of the commissioners, we find in s. 6 of 15 & 16 Vict. c. 57, that the commissioners are to use all lawful means to discover the truth; and by s. 8 the commissioners may require the attendance of "any persons whomsoever whose evidence in the judgment of such commissioners, may be material for the subject matter of the inquiry to be made by such commissioners, and to require all persons to bring before them such books, papers, deeds and writings as to such commissioner or commissioners appear necessary for arriving at the truth of the things, to be inquired into by them under this Act," and that section further provides that the persons so summoned "shall answer all questions put to them by such commissioners." I confess even if the matter stood on that section alone, I should be inclined to think we could not give a less meaning to the words "answer all questions," than "answer truly," because the object of the inquiry is to arrive at the truth, and the means of arriving at the truth is by examination and the production of documents. But, when we come to s. 11, we find the commissioners are to administer an oath to all persons who are examined before them. What is the oath to be? Is it to be an oath that they will answer all questions? Surely, it would be preposterous to swear a man to answer all questions, if the word "answer" is to mean only that he is to answer in point of fact; the object of the oath is to attest the truth of what he is about to say. It therefore does appear to me that it would be a strange thing if we could say the word "answer" is satisfied by a mere statement in point of fact which apparently answers, but which is really false. It would be foreign to the purpose for which an oath is administered if such a meaning could be attached to the words of s. 7. There is a difference in the language of the two Acts of Parliament. Mr. Bulwer suggests that the alteration was purposely made to induce criminals to appear and be examined, and answer questions put by the commissioners, and that it was anticipated that the information obtained from these sources would enable the commis-

1870

THE QUEEN v. HULME.

sioners more thoroughly to ascertain the immorality prevailing in the borough on the question of bribery. I cannot imagine that the legislature intended to rest contented with so trivial a result from entrusting the commissioners with such full powers. If that is not the view of the legislature, what did the legislature intend to impose as the condition on which the witness is to receive the indemnity but this, that he is to answer every question truly? Section 7 of 26 & 27 Vict. c. 29, does not contain the word "truly," but we are not to construe that section by itself, but must take it in connection with the other provisions of the Act into which it is to be taken to be interpolated; and, construing the section as incorporated in 15 & 16 Vict. c. 57, I come to the conclusion that Mr. Bulwer's construction is contrary to the chief object of the Act, and would lead to very unfortunate results. I think the word answer must receive the same construction as it would in any statute referring to an inquiry to elicit the truth of a matter in dispute, and I shall assign to the word the ordinary meaning it bears in such a case. I am, therefore, of opinion that "answer" means a true answer.

LUSH, J. I am entirely of the same opinion. We are to construe the language of an Act of Parliament in that sense which will best effectuate the obvious intention of the legislature. Construing the words of the 7th section of the last Act in that sense, I cannot entertain the slightest doubt that, wherever a reference is made to an answer to a question, the legislature meant a true answer, an honest bonâ fide answer. To construe it in the sense contended for by the defendant, in my judgment, would make it a manifest absurdity. The object of the Act was to enable the legislature, by the agency of the commissioners who are appointed under the Act, to get at the truth respecting the political morality of the place to which they are sent, and to that end the commissioners are armed with extraordinary powers of investigation; to that end also they have, amongst other powers, one of summoning any persons whom they believe capable of giving information to appear before them, and under this Act they are to put any questions to them which they think proper, which are calculated to elicit the information they want, and by the enacting part of s. 7 no person called as a witness before them is to be excused from

answering any question relating to any corrupt practice at or connected with any election forming the subject of inquiry, on the ground that the answer may criminate or tend to criminate himself. At common law a person, having a question put to him the answer to which may tend to criminate himself, can excuse himself from answering. The legislature says, in order to get at the truth in these matters, he shall not have that excuse, he shall be bound to answer; and, further, it says, that if he gives a false answer to any question put to him, he shall be liable to the pains and penalties of perjury, a further measure in order to enforce speaking the truth, enabling the commissioners to elicit information. I should be very much surprised to find in an Act of Parliament which made a false answer a criminal offence, anything which would amount to a premium upon giving a false answer; it was intended to make up to the witness for what they have taken away from him in the way of common law privilege. Whereas at common law a witness is excused from answering a question the answer to which would tend to criminate himself, because if he gave the answer it might be used as evidence against him, it is said, "You shall answer, but no statement made by you in answer to any question put shall, except in cases of indictment for perjury, be admissible against you in evidence in any case, either civil or criminal. We do that, and we give you more. If you do answer all such questions as are put to you, the answers to which tend to criminate you, then you shall not only be protected from having those answers used against you in any proceedings hereafter, but you shall have a certificate which shall protect you against any prosecution whatever for any crime you may have committed under the Corrupt Practices Prevention Act."

Therefore, the statute gives the witness a complete indemnity for every offence he may have committed with reference to the corrupt practices to be inquired into. That is what it gives, and surely when the legislature speaks of "answer," it means "true answer," otherwise it would be enabling a witness to purchase immunity for one crime by committing another. To say, "You may purchase an exemption from all the penalties you have incurred under the Corrupt Practices Act by committing perjury, and so making yourself liable to a prosecution which is very difficult

1870

THE QUEEN v. HULME.

indeed to establish," cannot have been the intention of the legislature. To read the 7th section thus: "You shall not be excused from answering any question on the ground that it would or may tend to criminate you, and you shall be liable to the pains and penalties of perjury; nevertheless, if you shall answer every question falsely or truly, you shall be entitled to a certificate that you have given those false answers, and that certificate shall protect you against any prosecution for any offence you have committed under the Corrupt Practices Act," appears to me to make the Act a perfect absurdity. We have to put a reasonable construction upon the words of the Act. I never have had a moment's doubt that that cannot be the construction of it. For the reasons I have given I am of opinion that wherever the legislature speaks of answering questions, it means that which is intended by the words "true answer;" answer, in the sense in which the word is ordinarily and popularly used.

Rule discharged.

Attorneys for prosecution: *The Solicitors to the Treasury.*
Attorneys for defendants: *Edgar, for Collins, Norwich.*

END OF EASTER TERM, 1870.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXIII VICTORIA.

PRESTON, APPELLANT; BUCKLEY, RESPONDENT. 1870 June 1.

Beer-house—Amount of Rating required for Licence—"Parish or Place"—"Township"—3 & 4 Vict. c. 61, s. 1.

By 3 & 4 Vict. c. 61, s. 1, no licence to sell beer or cider by retail shall be granted in respect of any dwelling house which shall not be rated to the relief of the poor of the parish, township, or place in which such house is situate, on a rent or annual value of 15*l.* at least, if situate in any city, cinque port, town corporate, parish, or place, the population of which exceeds 10,000. By the interpretation clause, "parish or place" includes any township or place separately maintaining its own poor.

A house was situate in and rated, at less than 15*l.* annual value, to the poor-rate of a township, which separately maintained its own poor, and had a population under 10,000; but the township formed part of a very extensive parish which had a population exceeding that number:—

Held, that the population of the larger district and not that of the rating area governed the amount of rating, and that the house being situate in a parish of which the population exceeded 10,000, rating under 15*l.* was insufficient.

CASE stated by two Justices for the West Riding of the county of York, under 20 & 21 Vict. c. 43.

At a petty session holden at Halifax on the 11th of September, 1869, an information was preferred by the appellant against the

1870

PRESTON v. BUCKLEY.

respondent, under s. 1 of 3 & 4 Vict. c. 61, for that he, at Sowerby, on the 4th of September, 1869, did unlawfully open his house for the sale of beer, he not being then duly licensed so to do.

At the hearing, it was proved that the township of Sowerby, in which the respondent's house is situate, is a township maintaining its own poor, and choosing its own parochial constable. The township contains a population, according to last census, of 8746 persons.

On the 4th of September, 1869, the respondent kept open his house for the sale of beer at ten minutes past ten o'clock in the evening, and did then sell beer to various persons in his house.

The house in which the respondent resides, and in respect of which he obtained a licence to sell beer, is rated to the relief of the poor of the township of Sowerby at 13*l.* 10*s.* gross and 11*l.* 10*s.* rateable value.

The township of Sowerby is situate within the parish of Halifax, which includes the borough of Halifax, and contains, according to the last census, 128,667 inhabitants.

It was contended, on the part of the appellant, that inasmuch as the respondent's house was situate within the parish of Halifax having a population of more than 10,000 inhabitants, in accordance with s. 1 of 3 & 4 Vict. c. 61 (1), it was required to be rated

(1) 3 & 4 Vict. c. 61, s. 1:—"No licence to sell beer by retail, under 11 Geo. 4 & 1 Wm. 4, c. 64, and 4 & 5 Wm. 4, c. 85, . . . shall be granted in respect of any dwelling house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate, on a rent or annual value of 15*l.* per annum at the least, if situate in the cities of London or Westminster, or within any parish or place within the bills of mortality, or within any city, cinque port, town corporate, parish, or place, the population of which, according to the last parliamentary census, shall exceed 10,000. . . . Nor shall any such licence be granted in respect of any dwelling house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate, on a rent or annual value of 11*l.* per annum, if situate within any city, cinque port, town corporate, parish, or place, the population of which, according to such last parliamentary census, shall exceed 2500 and shall not exceed 10,000. . . . Nor shall any such licence be granted in respect of any dwelling house which shall not, with the premises occupied therewith, be rated in one sum to the rate for the relief of the poor of the parish, township, or place in which such house and premises are situate, on a rent or annual value of 8*l.*, if situate elsewhere than as aforesaid; and every licence granted contrary hereto shall be null and void."

1870

PRESTON v. BUCKLEY.

at 15*l.*, and that as it was rated at the sum of 11*l.* 10*s.* only, the licence had been granted contrary to that section, and was therefore null and void. In support of this view the judgment of the Court of Queen's Bench in *Smith* v. *Redding* (1), and *Windsor* v. *Jeffery* (2), and the cases therein referred to, were relied on.

On the part of the respondent, it was urged that the parish of Halifax is about seventeen miles in length, and fifteen or sixteen miles in breadth, embracing an area of 75,740 acres, and consists of twenty-three townships, varying in extent from 10,080 acres to 890 acres, and in population from 28,990 to 388, each of which townships elects its own overseers of the poor, who make and levy a rate over their respective townships for the maintenance of the poor therein; that each township is well known by defined boundaries, maintains its own highways by separate highway rates, is separately rated to the county rate, and in every respect manages its own local affairs, and, when necessary, by levying local rates. That the township of Sowerby was a township maintaining its own poor, electing its own overseers (who make and levy rates), in every respect managing its own affairs, and not having more than 8746 persons therein, as found by the last census; that, therefore, the licence had been properly granted.

It was contended that the township of Sowerby was a township or place ejusdem generis as parish, according to the ruling of the judges in the case of *Washington* v. *Scott* (3); and inasmuch as by the interpretation clause, s. 32 of 11 Geo. 4 & 1 Wm. 4, c. 64 (which, by 3 & 4 Vict. c. 61, s. 20, is to be applied to that Act), the word "parish or place" is deemed to include any township, hamlet, tithing, vill, extra-parochial place, or any place maintaining its own poor, the population of the township of Sowerby must rule the rating of beer-houses, according to s. 1 of the last-mentioned Act, and therefore the licence had been properly granted.

The justices were of opinion that the contention of the respondent was the correct one, and that the licence was properly granted, and therefore dismissed the information.

The judgment of the Court was requested as to whether the jus-

(1) Law Rep. 1 Q. B. 489. (2) Law Rep. 1 Q. B. 493, n.
(3) 13 W. R. 939.

1870

PRESTON v. BUCKLEY.

tices were correct in point of law in their determination, or what should be done in the premises.

Anstie, for the appellant. The respondent's house was within the express words of s. 1 of 3 & 4 Vict. c. 61, being situate within a parish having more than 10,000 inhabitants; and it is immaterial that it is situate and rated in a township having less than this number. S. 1 clearly contemplates a house rated to a smaller place, and yet within a larger place, as is pointed out by Blackburn, J., in *Smith* v. *Reddin*. (1) The principle of the decision in that case, though on s. 15, is directly applicable to the present case.

Philbrick, for the respondent. In s. 1 the word "township" occurs, whereas "parish or place" are the only words in s. 15. The respondent's house was in an independent township, and being, according to the express words of the section, within a place having less than 10,000 inhabitants, was therefore sufficiently rated.

BLACKBURN, J. I am very sorry to say that the legislature have not sufficiently considered the difference of the size of parishes in different parts of England. The words of s. 1 are, however, plain, and they say that, in order to fit a house for a beer-house licence, it shall be rated in one sum to the poor-rate of the parish, township, or place in which it shall be situate, on a rent or value of not less than 15*l.*, if situate in the cities of London or Westminster, or within any city, town corporate, *parish or place*, having more than 10,000 inhabitants; that is, though rated to a small township, yet if situate within a large town or parish, it shall be rated in the higher sum. In some parts of England, where the parishes are moderate in size, this may be sensible and good legislation, but where parishes are almost the size and extent of counties, the enactment does not produce the effect which the legislature intended; when the effect is to say that a house situate, perhaps, on an open moor shall be rated just as if it were in a populous town. But the criterion of the amount of rating required is not the population of the rating area, but the population of the larger district, the "town, parish, or place" in which the house is situate. In the

(1) Law Rep. 1 Q. B. 489, 492.

present case the house is situate in the parish of Halifax, and, however anomalous the consequences may be, the construction must be the same, whether the district be town or parish. The decision of the justices was wrong, and the case must, therefore, go back to them with this intimation of the opinion of the Court.

1870

PRESTON v. BUCKLEY.

MELLOR, J. I concur in the decision my Brother Blackburn has pronounced; though, I confess, I do not feel the same certainty, as the consequences are so anomalous and inconvenient; but my doubt is not sufficient to induce me to dissent.

Case remitted to justices.

Attorneys for appellant: *Edwards, Layton, & Jaques, for Holroyd & Smith, Halifax.*

Attorneys for respondent: *Emmets, Watson, & Emmet, for Wavell, Philbrick, Foster, & Wavell, Halifax.*

THE UNITED PORTS AND GENERAL INSURANCE COMPANY *v.* HILL AND ANOTHER.

June 9.

Practice—Security for Costs—Action by Official Liquidator, in Name of an Unlimited Company being Wound up.

Where a company, registered as an unlimited company, is being wound up, and an action is brought in the name of the company, under the directions of the official liquidator, against a debtor of the company, the Court will not make an order that the plaintiffs give security for the defendants' costs.

THE plaintiffs were a company registered as an "unlimited" company, under the Acts of 1862 and 1867 (25 & 26 Vict. c. 89, and 30 & 31 Vict. c. 131), and carrying on business as an insurance company in London and Bristol.

On the 6th of November, 1869, an order was made for winding up the company, and an official liquidator was appointed. On the 10th of March, 1870, the official liquidator brought this action in the name of the company against the defendants for money received by the defendants for premiums in respect of policies effected by the defendants as brokers for the plaintiffs, to which the defendants pleaded a set off.

1870

UNITED PORTS INSURANCE CO. v. HILL.

On the 30th of March a master of the court made an order that the plaintiffs give security for defendants' costs, it being sworn that the official liquidator had stated that the company would pay a very small dividend only to their creditors.

A rule having been obtained to set aside this order,

Watkin Williams shewed cause. The case comes within the principle of cases in which the Court has exercised its discretion, and ordered a plaintiff to give security for costs where the nominal plaintiff was insolvent, and was suing in reality for the benefit of another. Here the real plaintiff is the official liquidator suing for third persons, viz., the estate and creditors of the company. No doubt an insolvent plaintiff cannot, in general, be compelled to give security for costs; but, in general, the defendant, if he succeeded, could issue execution for his costs against any property the plaintiff possessed; here by the statute (25 & 26 Vict. c. 89, ss. 87, 163) execution is forbidden against a company in the course of being wound up.

[COCKBURN, C.J. It is the duty of the official liquidator to collect the assets; it is like the case of an assignee of a bankrupt who can not be required to give security for costs: *Denston* v. *Ashton* (1), *Sykes* v. *Sykes*. (2)]

Horace Lloyd, Q.C., in support of the rule. It is a fallacy to say the official liquidator is suing. It is a fiction to invent the estate and general body of creditors as the persons beneficially interested. This is precisely the same case as if, without the intervention of the official liquidator, the company were getting in their debts in order to pay their creditors.

COCKBURN, C.J. The defendants ask us to apply the principle,—that where an insolvent party is put forward as a plaintiff by a solvent person, the plaintiff shall give security for the defendant's costs,—to the present case, where insolvent plaintiffs are themselves suing in their own names and for their own debt. It is true it is under the directions of the official liquidator, but that can make no difference; and it is clear that if the company were not being wound up, and were suing of their own accord, and

(1) Law Rep. 4 Q. B. 590. (2) Law Rep. 4 C. P. 645.

not under the directions of the liquidator, they could not be compelled to give security for costs. If there is any hardship on the defendants it is imposed by the statute, and affords no argument for the interference of the Court.

MELLOR, J. I am satisfied that the company are the party suing, and the action is only regulated by the intervention of the official liquidator. The defendants are in no worse position than any other defendant who is sued by an insolvent plaintiff unable to meet costs if unsuccessful.

LUSH, J. I cannot say that I am able to assent unreservedly to the judgments of the Court; at the same time I do not entertain a sufficiently strong opinion to express a formal dissent.

Rule absolute.

Attorney for plaintiffs: *A. Pulbrook.*
Attorneys for defendants: *Parker & Clarke.*

THE BOARD OF WORKS FOR THE GREENWICH DISTRICT *v.* MAUDSLAY AND OTHERS.

June 11.

Sea-wall or Embankment, Right of Way along—Presumption of Dedication from Public User.

There is nothing inconsistent with the purposes of a sea or river wall or embankment, erected to protect neighbouring lands, in a right of way along the surface; and the same evidence of user will raise a presumption of a dedication of a right of way by the owner of the soil in the case of such an embankment as in any other case of uninterrupted and open user by the public.

CASE stated without pleadings.

The case was stated at considerable length, but the following is sufficient for the judgment of the Court.

1. This action is brought by the plaintiffs against the defendants, for obstructing a footpath alleged to be a common and ancient highway in the parish of Greenwich.

2. The plaintiffs are the Board of Works for the Greenwich district, under the Metropolitan Local Management Acts, and as such are the surveyors of the highways. The defendants are iron

1870

GREENWICH BOARD OF WORKS v. MAUDSLAY.

ship builders, carrying on business and occupying premises on the tongue of land called East Greenwich Marshes, on the banks of the Thames, opposite Blackwall Reach. The reversion in fee of the premises is in Morden College, of whom the defendants hold under an assignment of the original lease to the National Boat-building Company.

3 & 4. The path in question passes through the defendants' premises, and passes along the top of the river wall or embankment, formed and maintained for the purpose of keeping out the water of the river Thames from the marsh lands enclosed and protected by the wall or embankment. These lands form the projecting tongue of land, bounded by the river Thames on the west, north, and east, and by the Trafalgar Road and Lower Greenwich and Woolwich Road on the south, and the tongue of land is commonly called East Greenwich Marshes, and is protected by the wall.

6. No evidence was given as to the original construction of the wall; but between the passing of the statute 37 Hen. 8, c. 11, "An Act for the Marshes beside Greenwich," and the coming into operation of the Metropolitan Local Management Act, 1865, it has been repaired and maintained by the commissioners of sewers mentioned and referred to in 11 & 12 Vict. c. 112; and between the passing of that Act and of the Act for the Metropolis Local Management, by the Metropolitan Commissioners of Sewers; and since the coming into operation of the last Act, the plaintiffs under the powers of that Act (s. 68, &c.) have repaired and maintained it.

7. The servants and agents of the commissioners of sewers, and subsequently of the plaintiffs, have constantly repaired the wall, piercing it with drains, constructing sluices in it when necessary for the purpose of draining the marshes, and have used the path and worked on the wall in the course of executing the necessary works.

8. Till of late years very few buildings existed on the tongue of land, but business premises and factories have of late years been built and established along the river bank, and many houses and buildings have been constructed.

9. So far back as the memory of man extends the path in ques-

tion has been used without interruption (except as hereinafter mentioned) by the occupiers of the land enclosed and protected by the wall, and, since the factories and other buildings were built and occupied, by the persons employed at the factories and in the occupation of the buildings, as a means of communication between the factories and buildings and the adjacent neighbourhood, and from one factory or building to another. It has also been used so far back as living memory extends by all persons as a pleasure walk, having been and being a favourite river-side walk of the population of Greenwich and its neighbourhood. It has been also used without interruption by watermen and pilots on the look-out for ships coming up the river; watermen and pilots, and other passengers have been constantly landed on the bank from ships in the river, and from the other side of the river, and have used the path as their way back to Greenwich. Within the memory of living witnesses, an extensive fishery of a fish called the shad used to be carried on at this part of the river with seine nets, and the fishermen and others have hauled their seine nets on shore at all parts of the bank, and used the path as a means of communication. And, generally, the path and that part of it passing through the defendants' premises has been used by the public, without interruption (except as hereinafter mentioned) for the purposes of recreation and business, as a public footpath. A landing place, very frequently used by watermen landing passengers from ships or from the opposite side, was at a point called the Chalkstones on the defendants' premises, and these persons have used the path as the way to Greenwich. This was a point where the race of the tide kept the stones put down to protect the wall clear of mud, and thus a good landing place was afforded. Lately, the defendants have put down a private causeway there, for which they pay rent to the conservators of the river Thames. At several points along the course of the path, where the fences dividing the various properties cross the wall and the path, stiles were put up and maintained for the convenience of persons using the path; but there was no evidence by whom they were put up or maintained.

11. There is no evidence of any express dedication of any part of the path to the public, except so far as the new parts of the path given in substitution of the parts stopped up by the proceedings

1870

GREENWICH BOARD OF WORKS v. MAUDSLAY.

hereinafter mentioned may be considered to have been expressly dedicated.

12. The case then set out, subject to objection by the defendants, the details of an action by one of the occupiers of premises through which the path passed, against the surveyor of the roads for the time being, for trespass in removing an obstruction which the plaintiff had put across the path, in which action, the defendant relying on the path being a highway, the plaintiff was nonsuited; and also subject to the same objection, the details of proceedings by which various parts of the path had been diverted by order of quarter sessions on the substitution by the applicants of more commodious ways. A proposal had also been made by the National Boatbuilding Company, in conjunction with others, to the vestry for the diversion of the path where it passed through the premises now occupied by the defendants, but the vestry would not accede to it.

21. In August, 1865, the defendants, having succeeded to the occupation of the premises, stopped up the path by erecting across it a high wooden fence backed by a quantity of iron.

22. This obstruction was removed in September by the plaintiffs in their capacity of surveyors of the highways, but was immediately replaced by the defendants.

23. The plaintiffs then preferred an indictment at the quarter sessions, which was removed into this court, and at the trial a verdict was taken for the Crown subject to a case; and it was agreed that the judgment to be entered in that case should abide the ultimate judgment entered up in the present case.

The Court was to be at liberty to draw inferences of fact.

The question was, whether the defendants were guilty of obstructing a public way.

Mellish, Q.C. (*Barrow* with him), for the plaintiffs. There is, in paragraph 9 alone, ample evidence of dedication of the way if the case had been an ordinary case; and there is nothing inconsistent with the object of the embankment in the user by the public of the surface as a footpath. The ownership of sea banks is in the owners of the neighbouring land, the right of user of the banks in the public, and the commissioners only intervene in doing what

is necessary in keeping up the embankment: Callis on Sewers, pp. 73, 74. [He also cited *Rex* v. *Leake* (1); *Surrey Canal Co.* v. *Hall.* (2)]

Raymond (*W. B. Cooper* with him), for the defendants. A sea wall cannot be dedicated to the use of the public as a footpath; such a dedication is inconsistent with the object and purposes of the wall; it is an artificial structure, and in this it differs from an embankment, and the ownership is in those who are bound to repair it: Callis on Sewers, p. 74. [He also cited *Reg.* v. *Paul* (3); *Chapman* v. *Cripps* (4); *Rex* v. *Pagham Commissioners.* (5)]

COCKBURN, C.J. I think there is, in the statement of the facts of this case, abundant evidence to establish a dedication to the public of the footway, and of a right in the public to use it, unless there is anything dehors the case to control what I presume to be the necessary effect of the facts which are stated.

The legal proposition contended for by Mr. Raymond on behalf of the defendants is, that as this footpath passed over the top of the sea wall which was erected to protect the land against the river, no right can have been acquired by the public, because the wall is under the control of the commissioners of sewers, and erected for public purposes. Now we have heard no authority cited for that proposition, which appears to me to be a great deal too large. The power to erect a sea wall or embankment as a protection against the sea, or from the influx of the tide in rivers, is one of those things which emanate from the prerogative of the Crown for the general safety of the public; and no doubt the ordinary rights of property must give way to that which is done under that great prerogative authority for the protection and safety of the public, but only to the extent to which it is necsssary that private rights or public rights should be sacrificed for the larger public purposes,—the general common weal of the public at large. And so far as the rights of property, or the rights acquired over property, as in the case of a public right of way acquired by the public, can be exercised consistently with the larger public purpose

(1) 5 B. & Ad. 469.
(2) 1 M. & G. 392.
(3) 2 Mood. & Rob. 307.
(4) 2 F. & F. 864.
(5) 8 B. & C. 355.

1870

GREENWICH BOARD OF WORKS v. MAUDSLAY.

for which the power of the Crown is exercised, the rights of property need not be interfered with, or the rights incident to it.

In the present case it appears that this enjoyment by the public of the right of way, for aught we know, existed before the sea wall in question was erected, or, at all events, we may fairly infer has been used and enjoyed by the public from the time those sea walls were first erected, which, as my Brother Blackburn has thrown out in the course of the argument, possibly date as far back as the time of the Roman empire in this country. If those rights of ownership (and it is the right of ownership that Mr. Raymond contends for on behalf of the defendants), or the rights incidental to the ownership, can be enjoyed, or the right of the public to this footway can be enjoyed, consistently with what is necessary for the general public welfare in that district, I can see no reason why they should not be enjoyed with it.

There is no doubt that this footway can be used by the public without in any way interfering with the maintenance of this necessary sea wall or embankment. I quite agree, if we thought it could not, or if it was necessary for public purposes, or for public safety in that district, that the commissioners should alter the level of that wall so as to interfere and obstruct the public right of way, the right of way must yield to the larger and more important purpose for which the power of the commissioners of sewers was originally given. I see nothing to render this power inconsistent with the enjoyment of the rights of the owner and the rights which the public may have acquired against the owner by prescription or dedication, or whatever may be the origin of the right which the public may have; and I see no reason whatever why, in point of law, in point of public policy, or in point of fact, those two things should not co-exist. I think Mr. Raymond has failed to make out that that state of facts, which under ordinary circumstances would clearly establish a right of way in the public, does not do so here.

BLACKBURN, J. I am of the same opinion. The only question is, whether the plaintiffs have shewn that the public, as against the defendants, have a right, as the public, to use this footpath where the defendants have obstructed it. Paragraph 9, after

stating exhaustively almost, that the path had been used in every possible way in which it could be used, proceeds to say, "and generally the path, and that part of it passing through the defendants' premises, has been used by the public without interruption (except as hereinafter mentioned) for the purpose of recreation and business as a public footpath." That, as I gather from what is stated, proves the exercise of the right to have been as far back as living memory goes; and there can be no question at all that that would establish a right of public footway, if it was on ordinary level ground.

But Mr. Raymond has insisted on this point:—The path in question goes along the top of an artificial embankment or wall; which, as it appears from the case, existed there, from what time does not distinctly appear, but certainly before the time of Henry VIII., and it is not at all impossible that it existed before the time of memory; but at all events as long as any evidence can go, it has existed there, intended as a defence to the marshes, and has, in point of fact, been kept up by the commissioners of sewers for the defence of the marshes. Mr. Raymond's contention is, that it is impossible in point of law, that there can be a right in the public to go along the top of such an embankment. I agree thus far with what he says, that the fact of its being an embankment kept up by the commissioners of sewers, to protect the land from inundation, is paramount to the right on the part of the public, and that whatever is inconsistent with that could not stand. I think where this footpath exists, if in any way the user of it as a footpath comes to be inconsistent with the maintenance of the embankment, the commissioners taking proper steps to repair the embankment, that the right of way must be interrupted for that purpose. I see no anomaly or inconsistency in point of law in this.

It is very like that which constantly occurs where a person, building a house, partially stops up the street. And, therefore, I do not see why there should not be a footpath at the top of a sea wall, subject to the right of the commissioners to interfere with it.

But if that were so, Mr. Raymond argues there might be a difficulty arising as to the liability of the parish to repair. No doubt the parish may not be indictable for not repairing this

1870

GREENWICH BOARD OF WORKS v. MAUDSLAY.

way, on the ground that the commissioners of sewers, keeping up the embankment, would be the persons who should keep the path in order. That is a matter which can be decided when it comes to be a question between the commisioners of sewers and the parish as to the liability of the parish to repair; but when it does arise I should require more opportunity of considering the law applicable to the subject. Mr. Raymond urged that there are many cases in which casual trespassers using the embankment, and walking over it at one time or another, might give rise to rights of way. I do not think that is founded on the right understanding of what constitutes a right of way. It is necessary to shew in order that there may be a right of way established, that it has been used openly as of right, and for so long a time that it must have come to the knowledge of the owners of the fee that the public were so using it as of right, and from this apparent acquiescence of the owners a jury might fairly draw the inference that they chose to consent, in which case there would be a dedication.

I think, therefore, looking at all these elements, and taking into account the extent to which this footpath has been used for practical purposes, that this right is established. Where it is sought to prove a right of way along the top of an artificial embankment such as the present, it is more difficult to prove that there has been that right acquired by the public, and therefore in such a case the owners would stand a better chance than a landowner in ordinary cases. You may have a way along the top of an artificial embankment, as every one well knows, such as the Thames Embankment. I cannot imagine it possible that anybody would say in that case that that could not be so. Probably, there the Act of Parliament comes in question; but supposing it had been built at common law by people exercising common law powers, I cannot see how if the public have acquired a right by user to walk there they could obstruct the public.

Taking that view of the matter in the present case, and looking to the extensive manner in which the user is found in the 9th paragraph, I think it is established that there was this right, and consequently that the defendants had no right to cause the obstruction, and, therefore our judgment must be for the plaintiffs.

MELLOR, J. I can see nothing in the nature of the property and the embankment itself or the object of it which is inconsistent with the user by the public as a footpath. The powers of the commissioners of sewers are paramount to the use by the public of the embankment as a footway. It may be that the footway may on occasions be interrupted by the necessity of repairs, or by the works of the commissioners of sewers; but, in the meantime, it appears to me that there is nothing in that inconsistent with the use by the public in the way in which they have used it so as to acquire a right over it.

I quite agree with Mr. Raymond that it requires probably in such a case as this, and certainly in many cases, that the nature and extent of the user and enjoyment by the public must be so extensive and so constant as to leave no doubt that the parties, who had the right to interfere, have not in any way interfered to prevent the acquisition of the right on the part of the public. But here the evidence is all one way. There is no evidence of the least interruption, nor the least desire to interrupt, nor any act of interruption. The user is as complete and extensive as one could well imagine user to be, and it has existed for a long time. I think the user and the nature of it are so large and continuous as to leave no doubt of the acquisition of the right, and unless there is something in the nature of the property and the duty of the commissioners of sewers which is absolutely inconsistent with the acquisition of the right by the public, the user is abundantly and sufficiently shewn, and that user is a lawful user.

LUSH, J., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Kingsford & Dorman, for E. W. James, Greenwich.*

Attorney for defendants: *J. Evans.*

1870 THE QUEEN, on the Prosecution of THE GUARDIANS OF THE
June 11. HENLEY UNION, Appellants; *v.* THE GUARDIANS OF THE
ABINGDON UNION, Respondents.

Poor—Removal—Irremoveability by Reason of Residence—Animus Revertendi—9 & 10 Vict. c. 66, s. 1.

W. H. was the illegitimate son (born in 1847 at R.) of a single woman, who married in 1858, and he lived with his mother and her husband, and was maintained by them. They had lived for more than a year in the parish of L. on the 5th of August, 1862, when W. H. was elected a pupil at "the School for the Indigent Blind," in another union, being then about fifteen years and six months old. The school was a charitable institution supported by voluntary contributions; the pupils were lodged, and clothed, and fed, as well as taught, out of the funds of the institution. The pupils were discharged by the committee when they were sufficiently instructed, or when they attained twenty-one years, or for misconduct. W. H. remained and continually resided at the school as a pupil until the 19th of July, 1868, when he was discharged, being more than twenty-one years old. During his residence at the school he was wholly maintained, clothed, lodged, and fed out of the school funds, and neither his mother nor her husband contributed to his support; but he went to them at L., and lodged with them for five weeks in the summer of each of the years 1863, 1864, and 1865, and for six weeks in the summers of 1866 and 1867, and during those periods he was maintained by his mother and her husband. On his discharge from the school in July, 1868, W. H. returned to his mother and her husband at L., and was maintained by them till March, 1869, when he became chargeable to L. He had no other settlement than his birth settlement.

On appeal against an order for the removal of W. H. to his place of settlement, the quarter sessions drew the inference from the above facts that there was an animus revertendi in W. H.; and they held that he had constructively resided with his mother and her husband in L. for more than a year, and was therefore irremoveable:—

Held, that the sessions were justified in deciding that the pauper had continued to reside with the parents and was irremoveable.

On appeal against an order of justices for the removal of Walter Hopkinson from the Abingdon Union to the Henley Union, the Quarter Sessions quashed the order, subject to a case.

Walter Hopkinson was born in the parish of Rotherfield Grey, in the appellants' union, on the 13th of January, 1847, the bastard child of one Jane Hopkinson, a single woman.

On the 10th of November, 1858, Jane Hopkinson married William Roberts. She resided with her husband first at Henley, and afterwards at Reading, till the 16th of June, 1861, when they

removed to Littlemore, in the respondents' union, where they have resided ever since.

The pauper lived with his mother and her husband, and was maintained by them without relief till the 5th of August, 1862, when he was elected and admitted to be a pupil at the "School for the Indigent Blind" in St. George's Fields, Southwark, being then about fifteen years and six months old.

The "School for the Indigent Blind" is a charitable institution supported by voluntary contributions, and is under the management of a committee. The pupils are elected by the votes of the subscribers, and are lodged, clothed, and fed, as well as taught, out of the funds of the institution. The pupils are discharged by the committee when they are sufficiently instructed, or when they attain twenty-one years of age, and they may also be removed for misconduct.

The school is maintained for educational purposes only, and by one of the rules for its management it is provided that no applicant deficient in intellect or physical power, or not in good health, or married, or unable to wash or dress without assistance, or subject to fits or scrofula, hereditary disease, or to any disorder which may be prejudicial to the pupils in the school, can become a candidate.

The pauper remained and continually resided at the school as a pupil and subject to its rules and discipline until the 19th of July, 1868, when he was discharged by order of the committee, being then more than twenty-one years old.

During his residence at the school the pauper was wholly supported, maintained, clothed, lodged, and fed out of the funds thereof, and neither William Roberts nor his mother in any way contributed to his support during such residence, but he went to them at Littlemore, and stayed with them for five weeks in the summer of each of the years 1863, 1864, and 1865, and for six weeks in the summer of each of the years 1866 and 1867, and the last of such visits terminated in the autumn of 1867. During each of these periods he was supported, maintained, lodged, washed for, and fed by William Roberts and his mother.

After his discharge from the school the pauper returned to Littlemore, being then over twenty-one years of age, having no other place to return to, and remained at Littlemore with, and

1870

THE QUEEN v. ABINGDON.

was supported, maintained, clothed, lodged, and fed by William Roberts and his mother till the month of March, 1869, when he became chargeable to the respondents' union, never having done any act to acquire any settlement other than his birth settlement.

On the 10th of May, 1869, the guardians of the respondents' union obtained the order of removal.

Upon the hearing of the appeal the above facts were admitted or proved; and the sessions thereupon drew the inference that there was an animus revertendi in the pauper; and adjudged that the pauper had, under the circumstances, constructively resided with William Roberts and his mother in the parish of Littlemore for more than one year next before the making of the order without receiving relief, and was therefore irremoveable therefrom.

If the Court should be of opinion that the above inference and the judgment of the sessions were justified and right in law respectively, the order of the sessions was to be confirmed; if otherwise, the order of sessions was to be quashed, and the order of removal confirmed.

Pater appeared for the respondents, but

THE COURT called upon

Harington, and *J. Bros*, for the appellants. They argued that when the pauper went to the school he became, to all intents and purposes, resident there; and he, during that residence, merely casually made visits to his mother. After his discharge from school, he again came to reside in Littlemore, but only for a short time before he became chargeable. They cited *Reg.* v. *Glossop*. (1)

COCKBURN, C.J. I think, on the facts, the sessions were right in saying there was a continuance of the residence of the pauper in Littlemore. It does not signify whether a child is illegitimate or not; the house of his mother and her husband was his home, and he goes to the asylum, not with the idea of abandoning his home with his parents, but simply for the purpose of being educated; and at any moment, if he had been discharged, or had been minded to leave, he would at once have gone back to them; as he

(1) Law Rep. 1 Q. B. 227.

1870

THE QUEEN v. ABINGDON.

did for several weeks during each year that he was a pupil in the asylum, and finally on his discharge. This case is clearly distinguishable from *Reg.* v. *Glossop* (1), because, in that case, during the service, there was a clear intention on the part of the girl of remaining and residing in another house than that of the mother; and only an intention of returning contingent on her being discharged from service.

BLACKBURN, J. I am of the same opinion. It is clear that this pauper resided and had his home with his mother and her husband in Littlemore up to August, 1862. He was then removed to the school; and the question that arises is, did that make him cease to have his home with his parents? On a question of residence, it is immaterial whether the friends with whom the child resides were legally bound to maintain him or not; up to sixteen he would naturally reside with his mother and her husband; at the age of sixteen he might choose his own place of residence; and if he had chosen another place, he would, of course, have ceased to reside in Littlemore. He was charitably maintained at the asylum, beyond that age, at the pleasure of the committee; but he probably would still continue his residence with his parents; and when we find a short holiday during each year was spent with the parents, this is very strong evidence that his residence with them continued. And when, on attaining twenty-one, he was discharged from the school, he still continued to reside with them. The sessions had to draw inferences in order to decide whether the residence in Littlemore was broken or not during the time the pauper was in the asylum; and they drew the inference that there was an animus revertendi in the pauper, and adjudged that the pauper had constructively resided with his mother and her husband. I do not like the phrase "constructive residence;" when a person is physically absent from his place of residence for a time, if he has an animus revertendi, his residence continues; and the question in such case is, whether he continues to be resident, or has ceased to be resident by taking up his permanent residence elsewhere. In the present case there was ample evidence from which the sessions might find that the pauper had not ceased to be resident in Little-

(1) Law Rep. 1 Q. B. 227.

1870

THE QUEEN v. ABINGDON.

more. All the mischief which the statute intended to prevent would ensue were we to hold that the pauper had not become irremoveable; he would have to go back to the place of his birth; and I think that our decision comes within the real spirit of the Act.

MELLOR, J. There was abundant evidence that the understanding between the mother and her husband was, that their house should be the son's place of residence; and the frequent returns there during his stay at the asylum, and his final return on his discharge, are strong to justify the inference the sessions drew; and it is impossible to say that their decision was wrong.

LUSH, J. I was at first inclined to take a contrary view. The question is, whether, when at the asylum, there was an animus revertendi to the parents' house. It appears that the child's place of residence was throughout regarded as the house of his parents, the place to which he could go at any time, and where he would be received when discharged; and the sessions were, therefore, right in the conclusion to which they came.

Order of sessions affirmed.

Attorneys for appellants: *Dale & Stretton.*
Attorneys for respondents: *Pattison, Wigg, & Co.*

KEARNEY *v.* THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY.

1870
June 15.

Evidence of Negligence—Real Property—Fall of a Brick from a Bridge over a Highway—Railway Company.

As the plaintiff was passing along a highway, under a railway bridge of the defendants, which was a girder bridge resting on a perpendicular brick wall with pilasters, a brick fell from the top of one of the pilasters on which one of the girders rested, and injured the plaintiff; a train had passed just previously :—

Held (by Cockburn, C.J., and Lush, J.; Hannen, J., dissenting), that, the defendants being bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was primâ facie evidence from which the jury might infer negligence in the defendants.

Ld. in Ex. Ch. 6 B. 759

DECLARATION, that the defendants were possessed of a bridge over a certain public highway, and it became their duty to maintain and keep in repair the bridge, so that it should not be injurious to any person passing under it; yet the defendants so negligently maintained the bridge, that while the plaintiff was lawfully passing under the bridge a portion of the materials of the bridge fell down and injured the plaintiff.

Plea: Not guilty. Issue joined.

At the trial before Hannen, J., at the sittings in Middlesex after Michaelmas Term, 1869, it appeared, according to the plaintiff's evidence, that the plaintiff, on the 20th of January, 1869, was passing along the Blue Anchor Road, Bermondsey, under the railway bridge of the defendants, when a brick fell and injured him on the shoulder. A train had passed just previously, but whether it was a train of the defendants', or of another company (whose trains also pass over the bridge), did not appear. The bridge had been built three years, and is an iron girder bridge resting on iron piers, on one side, and on a perpendicular brick wall with pilasters, on the other, and the brick fell from the top of one of the pilasters, where one of the girders rested on the pilaster.

The defendants called no witnesses, but rested their defence on there being no evidence of negligence in the defendants; and also on the ground that the injury to the plaintiff's shoulder was not really caused by the falling of the brick.

1870

KEARNEY v. LONDON, BRIGHTON, &C., RAILWAY CO.

As to the evidence of negligence, the learned judge told the jury that if they thought the bare circumstance of a brick falling out was not evidence of negligence, they would find for the defendants; if they thought otherwise, for the plaintiff; and the Court would determine whether there was legal evidence of negligence or not, as to which he should reserve leave to the defendants to move.

The jury found a verdict for the plaintiff for 25*l.*

A rule was obtained to enter a nonsuit, on the ground that there was no evidence of negligence to leave to the jury.

June 8. *Murphy* shewed cause. This was a case in which, as has been said in similar cases, res ipsa loquitur; the mere happening of the accident is primâ facie evidence of negligence. If the bridge had been properly constructed and looked after, a brick would not have fallen out. So unusual an occurrence is primâ facie evidence of negligence, and it lay on the defendants to rebut this by shewing that they had used all due care: *Scott* v. *London Dock Co.* (1)

June 15. *Lopes, Q.C.*, and *Joyce*, in support of the rule. There was no evidence of negligence to go to the jury. It is said, res ipsa loquitur; but that only applies where something is shewn to be put in motion by the defendants or their servants, as in the only case cited by the other side, *Scott* v. *London Dock Co.* (1), where the crane by which the bags were being lowered was shewn to be in the actual use of the defendants' servants. *Byrne* v. *Boadle* (2) is distinguishable on the same ground. Here the bridge had been built three years, and all that is shewn is, that a brick fell from the wall.

[COCKBURN, C.J. The cause of action is the negligence in not properly maintaining the bridge; and it is said that if the bridge had been well kept, a brick would not have fallen out without any apparent cause.]

A train, on one or other of the lines, had passed just before, and this might have caused the brick to fall out; or, as it was in the

(1) 34 L. J. (Ex.) 17; s.c. in Ex. Ch. 34 L. J. (Ex.) 220; 3 H. & C. 596.

(2) 2 H. & C. 722; 33 L. J. (Ex.) 13.

middle of January, a frost might have been the cause. *Welfare* v. *London and Brighton Ry. Co.* (1) is very like this case; and it was there held that there was no evidence of negligence.

[COCKBURN, C.J. In that case a man, who was not shewn to have been guilty of any negligence, or to have been in the employ of the defendants, caused the accident.]

But it was argued, as in this case, that it was the duty of the company to keep their premises in a safe condition, and that they were, primâ facie, liable for negligence; but the Court did not accede to that proposition. The judgment of Martin, B., in *Briggs* v. *Oliver* (2), and of Erle, C.J., in *Cotton* v. *Wood* (3), are also strongly in favour of the defendants. In *Bird* v. *Great Northern Ry. Co.* (4), it was doubted whether the fact of a train running off the rails was primâ facie evidence of negligence. In *Smith* v. *Great Eastern Ry. Co.* (5), Willes, J., adopts what Erle, C.J., said in *Hammack* v. *White* (6), that he "did not assent to the doctrine that mere proof of the accident throws upon the defendants the burthen of shewing the real cause of the injury. All the cases, where the happening of an accident has been held to be primâ facie evidence of negligence, have been cases of contract."

COCKBURN, C.J. As we have had the whole matter carefully brought before us, with the cases bearing upon the subject, I think we should gain nothing by taking further time to consider it; and, therefore, although I regret to say we are not unanimous upon the point, I think it is better to dispose of the case at once.

My own opinion is, that this is a case to which the principle res ipsa loquitur is applicable, though it is certainly as weak a case as can well be conceived in which that maxim could be taken to apply. But I think the maxim is applicable; and my reason for saying so is this. The company who have constructed this bridge were bound to construct it in a proper manner, and to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those

(1) Law Rep. 4 Q. B. 693.
(2) 4 H. & C. at p. 408; 35 L. J. (Ex.) at p. 165.
(3) 8 C. B. (N. S.) at p. 571; 29 L. J. (C.P.) at p. 334.
(4) 28 L. J. (Ex.) 3.
(5) Law Rep. 2 C. P. at p. 10.
(6) 11 C. B. (N. S.) at p. 594; 31 L. J. (C.P.) at p. 131.

1870

KEARNEY v. LONDON, BRIGHTON, &c., RAILWAY CO.

who passed under it, the public having a right to pass under it. Now we have the fact that a brick falls out of this structure, and injures the plaintiff. The proximate cause appears to have been the looseness of the brick, and the vibration of a train passing over the bridge acting upon the defective condition of the brick. It is clear, therefore, that the structure in reference to this brick was out of repair. It is clear that it was incumbent on the defendants to use reasonable care and diligence, and I think the brick being loose affords, primâ facie, a presumption that they had not used reasonable care and diligence. It is true that it is possible that, from changes in the temperature, a brick might get into the condition in which this brickwork appears to have been from causes operating so speedily as to prevent the possibility of any diligence and care applied to such a purpose intervening in due time, so as to prevent an accident. But inasmuch as our experience of these things is, that bricks do not fall out when brickwork is kept in a proper state of repair, I think where an accident of this sort happens, the presumption is that it is not the frost of a single night, or of many nights, that would cause such a change in the state of this brickwork as that a brick would fall out in this way; and it must be presumed that there was not that inspection and that care on the part of the defendants which it was their duty to apply. On the other hand, I admit most readily that a very little evidence would have sufficed to rebut the presumption which arises from the manifestly defective state of this brickwork. It might have been shewn that many causes, over which the defendants had no control, might cause this defect in so short a time as that it could not be reasonably expected that they should have inspected it in the interval. They might, if they were able, have shewn that they had inspected the bridge continually, or that such a state of things could not be anticipated, and had never been heard of or known before. Anything which tended to rebut the presumption arising from an accident caused by the defective condition of the brickwork, which it was their duty to keep in a proper condition of repair, even if such evidence were but slight, might have sufficed; but the defendants chose to leave it on the naked state of facts proved by the plaintiff. Upon that naked state of facts, it is not unimportant to see

what might have been the cause of the defective condition of this brickwork. We have the fact, the datum, that the brickwork was in a defective condition, and we have it admitted that it was the defendants' duty to use reasonable care and diligence to keep it in a proper condition. Where it is the duty of persons to do their best to keep premises, or a structure, of whatever kind it may be, in a proper condition, and we find it out of condition, and an accident happens therefrom, it is incumbent upon them to shew that they used that reasonable care and diligence which they were bound to use, and the absence of which it seems to me may fairly be presumed from the fact that there was the defect from which the accident has arisen. Therefore, there was some evidence to go to the jury, however slight it may have been, of this accident having arisen from the negligence of the defendants; and it was incumbent on the defendants to give evidence rebutting the inference arising from the undisputed facts; that they have not done, and I therefore think this rule must be discharged.

LUSH, J. My mind has wavered considerably during the arguments, but I have arrived at last at the same conclusion as the Lord Chief Justice, that the fact of this brick falling, without any explanation on the part of the company, might reasonably lead the jury to the inference that its looseness was due to some want of care on the part of the company. It is not a matter of common occurrence for bricks to become loose and to fall from the fabric to which they belong. There must be some cause for it; and no cause is assigned, and there is no evidence whatever in the present case of anything having happened, which could lead to the inference that the brick was suddenly jerked out from its place. I do not think the argument on the part of the defendants, that possibly the changes of temperature operating upon the iron of the bridge may have tended to loosen the fabric, and so have occasioned the brick to fall, advances the defendants' case, because, inasmuch as that is a known effect of the ordinary changes of temperature, that ought to impose upon them the duty of more strict and frequent examination of the fabric. There is no proof here that there was any extraordinary change of temperature, any extreme frost beginning about this time, which would account for the

1870

KEARNEY v. LONDON, BRIGHTON, &c., RAILWAY CO.

occurrence. Nor do I think the defendants gain any advantage from the suggestion that the brick may have been loosened by the passing trains, because it was not shewn that there was anything extraordinary in the traffic at this particular moment. The trains had been running over the bridge for three years, and neither this accident, nor anything like it, had ever happened before. Therefore, in the absence of anything to account for the brick suddenly falling out, I can only suppose it must have been gradually loosened; and if so, the company might, if they had made a proper inspection from time to time, have discovered its condition.

I think, therefore, in the absence of any explanation whatever, of how it was the brick got so loose as to fall down on the passer by, the jury might reasonably have inferred that the company were negligent, and that if they had made a proper inspection they might have found out the condition of the bridge.

HANNEN, J. I very much regret that I cannot concur in the judgment of my Lord and my Brother Lush. It is not alleged that this bridge was improperly constructed; and it appears, as a matter of fact, that the whole structure had done its duty for a period of three years, and then there occurs an accident of a singular character. It was spoken of as a bridge; but it is to be borne in mind that the particular accident was this, that the brick in some way or other was detached from its place in a perpendicular wall. It did not fall by its own gravity simply, but from some cause or other it was jerked or shaken from its place. That occurring, after the wall had done its duty for a period of three years, I confess that I have no experience which will enable me to form any opinion whatever as to what was the cause. It is necessary that the plaintiff, who seeks to establish that the defendants have been guilty of negligence, should offer some evidence that they have been guilty of such negligence. In this case the evidence consists of the bare fact that the accident happened from some utterly unknown cause. I think it did not lie on the defendants to offer any evidence in such a state of things. If any conjecture may be offered as to whether or not the defendants, by proper inspection, would have been able to guard against the occurrence of that accident, it seems to me that it lies on the plaintiff to shew

that the facts were such that by an inspection anybody might have seen that the brick was about to fall down. The plaintiff did not give any such evidence, and I cannot but think that if it had been possible, remembering that such evidence would have depended only on theory—a class of evidence which it is not at all difficult to get—there would have been no difficulty in obtaining such evidence, if anybody could have put forward a plausible theory. On the other hand, the defendants, it seems to me, were in the same position in which I avow I am—unable to conjecture why the brick did fall out, and therefore unable to offer evidence upon it. A theory was suggested, not in the evidence, but by myself in the course of the argument, as a possible hypothesis, that the cold might have caused a contraction of the iron girder, which might have drawn the brick from its place. If that were the cause, that is a thing which everybody knows depends upon the sudden occurrence of frost, which no previous inspection could give anybody any warning of. I repeat there is no evidence of that, and it is a conjecture which is only hazarded by myself, and hazarded in favour of the defendants.

I regret, as I have said, that I cannot agree with my Lord and my Brother Lush; but, fortunately, the facts are of so peculiar and exceptional a character, that this disagreement is not likely to lead to any further divergence of opinion; similar circumstances are but little likely to arise.

Rule discharged.

Attorneys for plaintiff: *Fitch & Fitch.*

Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

1870

June 15.

HEWITT AND CO., LIMITED, *v.* CORY.

Costs—County Courts Admiralty Jurisdiction Act, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 9—*Construction—Less than* 300*l. recovered" in Admiralty Cause in "Superior Court"—Practice—Suggestion on record.*

10 & 68/75

The County Courts Admiralty Jurisdiction Act, 1868, by s. 3, gives jurisdiction to county courts to try, amongst other causes, "as to any claim for damage to cargo or damage by collision, any cause in which the amount claimed does not exceed 300*l.*"

By s. 9, if any person shall take in a "superior court" proceedings which he might, without agreement, have taken in a county court, "and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that admiralty cause is limited by this Act, . . . he shall not be entitled to costs, and shall be liable to be condemned in costs."

In an action in the Queen's Bench for damage caused by a collision between the plaintiffs' and defendant's vessels in the Thames, the plaintiffs claimed over 300*l.* in their declaration and particulars of demand. The defendant paid into court 254*l.*, which the plaintiffs accepted in full satisfaction of their claim:—

Held, that "superior court" in s. 9 means the superior courts of common law at Westminster and the Court of Chancery; that the plaintiffs' right to costs depended upon the amount "recovered" in the action, and that the 254*l.* had been "recovered" within the meaning of s. 9, and therefore that the plaintiffs were not entitled to costs.

Held, further, that it was not necessary that the defendant should enter any suggestion on the record in order to deprive the plaintiffs of their costs.

RULE, calling on the plaintiffs to shew cause why an order of Bramwell, B., ordering the master to tax the plaintiffs' costs, should not be rescinded.

The first count of the declaration was for damage caused to the plaintiffs' vessel in the Thames by a collision with a vessel of the defendant. There were also money counts, and the declaration claimed 1500*l.*

The particulars of demand claimed 254*l.* 12*s.* 10*d.* for damage to the plaintiffs' vessel; 100*l.* for depreciation in the value of the vessel; and 300*l.* for salvage services rendered to the defendant's vessel after the collision.

Pleas: 1. As to first count, payment into court of 254*l.* 12*s.* 10*d.* 2. As to money counts, never indebted.

Replication, accepting the 254*l.* 12*s.* 10*d.* in full satisfaction of the plaintiffs' claim.

On the 11th of May, 1870, Bramwell, B., ordered that the

master should tax the plaintiffs' costs. The rule was to rescind this order.

C. Anderson shewed cause. (1) The plaintiffs are not deprived of their costs by the County Courts Admiralty Act, 1868. (2) This cause was never within the jurisdiction of a county court, because the plaintiffs "claimed" more than 300*l.* The jurisdiction of county courts in admiralty causes is given by s. 3, and that jurisdiction depends upon the amount claimed. Even if any county court had jurisdiction, the plaintiffs are not deprived of their costs by s. 9, which only applies to cases where a plaintiff "recovers" less than 300*l.* A payment into court, as in this case, is not within s. 9: see *Chambers* v. *Wiles* (3), and *Parr* v. *Lillicrap.* (4) Even if the plaintiffs are deprived of costs under the statute, the defendant cannot at present take advantage of this because he has not entered a suggestion on the record of those facts which deprive the plaintiffs of the usual right to costs: *Watson* v. *Quilter* (5); Chitty's Archbold, 11th ed. pp. 502, 1553. [He also argued that the Court could not assume that there was any county court having admiralty jurisdiction over the cause, and that "superior

(1) In the Bail Court, before Blackburn and Mellor, JJ.

(2) 31 & 32 Vict. c. 71, s. 3, enacts that "any county court having admiralty jurisdiction shall have jurisdiction, and all powers and authorities relating thereto, to try and determine . . . the following causes (in this Act referred to as admiralty causes):

"1. As to any claim for salvage, any cause in which the value of the property saved does not exceed 1000*l.*, or in which the amount claimed does not exceed 300*l.* . . .

"3. As to any claim for damage to cargo or damage by collision, any cause in which the amount claimed does not exceed 300*l.* . . ."

S. 9, "if any person shall take in the High Court of Admiralty in England, or in any superior court, proceedings which he might, without agreement, have taken in a county court, except by order of the Judge of the High Court of Admiralty, or of such superior court, or of a county court having admiralty jurisdiction, and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that admiralty cause is limited by this Act, . . . he shall not be entitled to costs, and shall be liable to be condemned in costs, unless the Judge of the High Court of Admiralty or of a superior court before whom the cause is tried or heard shall certify that it was a proper admiralty cause to be tried in the High Court of Admiralty of England, or in a superior court."

(3) 24 L. J. (Q.B.) 267.

(4) 1 H. & C. 615; 32 L. J. (Ex.) 150.

(3) 11 M. & W. 760.

1870

HEWITT v. CORY.

court" in s. 9 referred to the Court of Admiralty of the Cinque Ports.]

Lumley Smith, in support of the rule, was stopped by the Court. On the question of entering a suggestion on the record, he referred to 13 & 14 Vict. c. 61, s. 11, repealed by 30 & 31 Vict. c. 142, s. 33.

BLACKBURN, J. The County Courts Admiralty Act, 1868, gives jurisdiction, by s. 3, in the following cases:—[The learned Judge read the section.] Section 9 provides:—[He read the section.] I think it is clear that s. 9 means the superior courts of common law at Westminster and the Court of Chancery. Perhaps it is not quite clear whether it includes such courts as the courts of the county palatine of Lancaster. The action is for a collision, and the plaintiffs claimed more than 300*l.* The first question is, whether the fact that the claim exceeds 300*l.* entitles a plaintiff to costs when he recovers less than 300*l.* It is certainly difficult to know what is the true meaning of this statute, and the meaning of the words in s. 9, "liable to be condemned in costs," is not very clear. The claim here was for 254*l.* 12*s.* 10*d.*, and there were two additional items of claim, so as to make it appear that the claim was really one for more than 300*l.* The 254*l.* 12*s.* 10*d.* was paid into court, and taken out in full satisfaction of the plaintiffs' claim. It is said that this money was not "recovered." I think, however, that there is no doubt that the money thus paid into and taken out of court was "recovered," and that, therefore, a sum less than 300*l.* was "recovered" within the meaning of s. 9. The amount claimed in this case was probably colourable only. I think, however, that the general effect of the enactment in s. 9 is, that the amount actually recovered fixes the costs. It is said that this is a hardship. That may possibly be so. If so, however, it is a matter for the consideration of the legislature. The object of the provision is to compel parties to go into admiralty county courts when suing for small amounts, and leave may be obtained to sue in a superior court or in the Court of Admiralty, as mentioned in s. 9.

It is then said that it has not been shewn that there was any admiralty county court in which the plaintiffs could have sued.

I am clear that there was such a court. If for any reason there was no such court, it should have been shewn by the plaintiffs.

Lastly, it is objected that even if the plaintiffs are not entitled to costs, the facts that shew this should be stated upon the record by way of suggestion, to which there might be pleas, and then a fresh lawsuit. Lord Wensleydale so decided under the early County Courts Acts, and it caused a great scandal to the law, which was shortly afterwards stopped by 13 & 14 Vict. c. 61, s. 11. This section has been repealed by 30 & 31 Vict. c. 142, s. 33, but I think that the Act of 1868 means that no such suggestion is required. I think, therefore, that this rule must be absolute to set aside the order of Bramwell, B.

MELLOR, J. I am of the same opinion. I felt somewhat embarrassed at first by the wording of s. 3, which uses the word "claimed." It requires a careful examination of the statute to ascertain its true meaning. On reading all the Act I think it is clear that it does not bear the meaning contended for by Mr. Anderson. The real claim here was for less than 300*l.*, but I think the true test under s. 9 is the amount recovered. Here the amount recovered is less than 300*l.*, and therefore the case is within s. 9. If a party wishes to have an action tried in a superior court, he should obtain leave to bring it in such court. This was not done here. I think the order of Bramwell, B., must be rescinded.

Rule absolute.

Attorneys for plaintiffs: *Howard & Dollman.*
Attorneys for defendant: *Hillyer & Fenwick.*

1870

HARPER *v.* GODSELL.

June 15.

Conversion—Pledge by four Joint Owners of Chattel—Offer to redeem by Assignee of Interest of Three of the Four—Demand by Assignee—Refusal of Pledgee to Deliver Goods to Assignee—Construction of Power of Attorney—General Words—Ejusdem generis.

Four partners pledged goods with the defendant, with a power of sale, as security for repayment of an advance made by the defendant to them. Afterwards the partnership was dissolved, and the property of three of the four partners vested in the plaintiff under several deeds of assignment. The plaintiff, without authority from the fourth partner, tendered to the defendant the amount for which the goods were a security, and demanded the whole of the goods. The defendant refused to deliver the goods to the plaintiff:—

Held, that the refusal by the defendant was not such a conversion of the goods as would entitle the plaintiff to maintain an action of trover against the defendant.

P., a partner in the firm of B. W. & Co., gave A. a power of attorney "for the purposes of exercising, for me, all or any of the powers and privileges conferred by an indenture of partnership constituting the firm of B. W. & Co.;" and the power afterwards went on, "and generally to do, execute, and perform any other act, deed, matter, or thing whatsoever . . . in or about my concerns, engagements, and business of every nature and kind whatsoever":—

Held, that the former words restrained the generality of the latter words, and consequently that A. could not under this power execute a deed in P.'s name dissolving the partnership of B. W. & Co., and assigning over P.'s share of the partnership property.

Declaration by the plaintiff, as trustee on behalf of the creditors of B. Williams and F. R. Newton, under a deed for the benefit of creditors made between the plaintiff, and Williams and Newton, the debtors, under the Bankruptcy Acts, 1861 and 1868.

First count, trover for conversion of wine of the plaintiff, as such trustee. Second count, trover for conversion of the debtors' wine before the plaintiff became trustee. Third count, that before the plaintiff became trustee the debtors deposited wine warrants with the defendant as security for the amount of a bill discounted by the defendant for the debtors, with a power of sale, upon the terms that the warrants should be redelivered to the debtors on payment or tender of the money due to the defendant before the defendant should have exercised the power of sale; that all conditions, &c., had been fulfilled necessary to entitle the plaintiff to sue, yet the defendant had not redelivered the warrants to the debtors or to the plaintiff.

1870

HARPER v. GODSELL.

Pleas: 1. That the plaintiff was not trustee, and that the causes of action did not vest in him. 2. As to first and second counts, not guilty. 3. As to first count, denial of plaintiff's property. 4. As to second count, denial of the debtors' property. 5. As to first count, that the goods were the goods of the plaintiff jointly with F. Allison and E. Porro, and that the defendant, by the authority of Allison and Porro, sold the goods not in market overt, and did not thereby destroy or injure the goods, but merely caused the same to become the property of the plaintiff and the purchasers jointly, and that the title of the plaintiff remained unaffected by the sale. 6. As to the second count, a plea similar to the fifth substituting the debtors for the plaintiff. 7. As to the third count, denial of deposit. 8. As to the same, denial of payment or tender of amount due to defendant.

Replications: 1. Joinder. 2. As to 5th and 6th pleas, new assignment.

Rejoinder: As to new assignment, not guilty. Joinder.

The cause was tried in the Mayor's Court before the Recorder on the 25th of April, 1870, when it appeared that in 1868 the firm of B. Williams & Co. consisted of Williams, Newton, Allison, and Porro. Allison and Porro were abroad, in Calcutta and Morocco respectively. On the 23rd of December, 1868, Newton, duly acting on behalf of B. Williams & Co., deposited, under a written agreement, wine warrants with the defendant, as security for the repayment of 60*l.* which the defendant then advanced to B. Williams & Co., and for which B. Williams & Co. also gave their bill of exchange due on the 26th of March, 1869. The agreement gave the defendant a power of sale, and provided for the redemption of the wine by B. Williams & Co. on payment of the amount due to the defendant.

In January, 1869, B. Williams & Co. wished to execute a deed of assignment for the benefit of their creditors; and as this could not be executed in time by the partners who were abroad, it was resolved to dissolve the partnership. Newton held a power of attorney, from Porro, given in January, 1868. This power constituted Newton the attorney for Porro

"for the purposes hereinafter expressed, that is to say, for the purposes of exercising, for me, all or any of the powers and privileges conferred by a certain

1870

HARPER v. GODSELL.

indenture of partnership constituting the firm of B. Williams & Co. . . . and to receive and give receipts for all sums of money payable to me by virtue of the said indenture and all other debts or sums of money or securities for money which may be at any time due or payable to me in the United Kingdom, and generally to do, execute, and perform any other act, deed, matter, or thing whatsoever which ought to be done, executed, or performed, or which, in the opinion of my said attorney, ought to be done, executed, or performed, in or about my concerns, engagements, and business of every nature and kind whatsoever as fully and effectually to all intents and purposes as I myself could do if I were present and did the same in my own proper person, it being my intent and desire that all matters and things respecting the same shall be under the full management and direction of my said attorney."

Allison had also given a similar power of attorney to Williams.

On the 25th of January, 1869, a deed was made, to which each of the four partners was expressed to be a party. The deed purported to dissolve the partnership of B. Williams & Co., and to transfer Porro's interest in the partnership to the other three partners, who were to constitute a new firm. This deed was executed by Williams and Newton for themselves, and also by Williams for Allison, and by Newton for Porro under the beforementioned powers of attorney. On the 26th of January, 1869, a similar deed was made which was expressed to be between the three remaining partners. It purported to dissolve the new partnership made the day before, and to transfer Allison's interest in the partnership goods to Williams and Newton, who were to constitute a new firm. This deed was executed by Williams and Newton for themselves, and also by Williams for Allison, under the beforementioned power of attorney.

On the 29th of January, 1869, Williams and Newton executed a deed of assignment in the form given in schedule D. to the Bankruptcy Act, 1861, by which they assigned all their estate and effects to the plaintiff, to be administered for the benefit of their creditors. The deed was registered under s. 194 of the Bankruptcy Act, 1861, but did not bind non-assenting creditors under s. 192, for want of the requisite number of assents. After the execution of this deed Allison came to England and was informed of the deed, and approved of the assignments of his property in the partnership goods. Subsequently the plaintiff tendered to the defendant the amount due to the defendant on the security of the wine, and required the defendant to deliver the wine to him.

For the purposes of the decision of this case, it may be taken that the right amount was duly tendered by the plaintiff if the plaintiff were entitled to redeem the wine, and that the defendant absolutely refused to deliver the wine to the plaintiff. The defendant afterwards sold the wine for a sum larger than the amount which was due to him on the security of the wine. The bill of exchange given to the defendant by B. Williams & Co. was dishonoured.

On proof of these facts the plaintiff was nonsuited, with leave to move. (1)

A rule nisi to set aside the nonsuit, and for a new trial, was obtained pursuant to leave reserved.

R. Webster (*T. Salter* with him), shewed cause. (2) There was no conversion of the wine for which the plaintiff can maintain trover. The plaintiff was never entitled to the whole property in the goods, as Porro's interest never vested in him. The power of attorney given by Porro to Newton did not authorize Newton to dissolve the partnership in Porro's name, and to assign away Porro's share in the partnership goods, and Porro's partners had no implied authority to do this: Story on Partnership, s. 101. It is doubtful whether Allison's interest vested in the plaintiff, but at most the plaintiff never had more than three-fourths of the property in the goods. The plaintiff claimed the whole of the goods, and so claimed property which did not belong to him, and the defendant was entitled to refuse to give such property to the plaintiff. When a chattel is deposited with a bailee by two, it is not in the power of one of the depositors, or of assignees representing one of them, to take the chattel out of the bailee's hands without the consent of the other depositor: *May* v. *Harvey*. (3)

(1) The point on which the decision in this case turned does not appear to have been clearly taken at the trial. The Recorder's notes thus stated the grounds on which the defendant asked for a nonsuit, "1. That the warrants deposited on certain terms, those terms in written instrument, which is not produced. 2. The plaintiff has no title. The four partners have not agreed to assignment. Power of attorney does not authorize the execution of deed. The bare assignment insufficient to entitle plaintiff to sue. The deed not assented to by required number of creditors. Plaintiff could sue only for assenting creditors."

(2) In the Bail Court, before Blackburn and Mellor, JJ.

(3) 13 East, 197.

1870

HARPER v. GODSELL.

[BLACKBURN, J., referred to 2 Wms. Saunders, p. 47.]

Day, and *F. Turner*, in support of the rule. The power of attorney given by Porro to Newton contains the most general words, and therefore authorized the execution of the deed of the 25th of January, 1869, and Porro's interest in the partnership property therefore vested in the plaintiff. No question can arise about Allison's interest, because whatever may have been the original effect of the assignments of his interest, he has subsequently ratified them. Therefore the plaintiff had the whole interest in the goods when he demanded them from the defendant, and the plaintiff is therefore entitled to maintain this action. Even if Porro's interest did not pass under the deed of assignment, the plaintiff is entitled to sue the defendant in trover, because after a due tender of the money the defendant became a mere wrongdoer, and had no right to hold the goods as against one of several joint owners. As between the plaintiff and the defendant, the plaintiff was in any case entitled to the goods after payment or tender of the defendant's debt. Even if the defendant's contention is correct in law, he cannot now make use of it, because it was not raised at the trial, or before the trial. (1,

BLACKBURN, J. I think that this nonsuit ought to stand on the ground which was not distinctly brought forward either at the trial or before. Four partners pledged the warrants in question as a security to the defendant: all four joined in the transaction, which amounted to a pledge only. The effect of the transaction was, that the four partners had the general property, and the defendant, the pawnee, had a special property in the goods. The defendant became entitled to the possession of the goods, and had also a power of sale in case the money should not be duly repaid. Until the money was repaid, a special property remained in the defendant,

(1) A considerable part of the argument on both sides was occupied in discussing whether, on the facts of the case, there had been an absolute refusal to give up the wine, or only a qualified refusal in order that the defendant might be sure that he was giving the wine to the persons entitled to it. There was also a question as to the amount of the money tendered, and the time at which the tender was made. These facts became immaterial in the view taken by the Court, and the arguments and facts relating to them are therefore omitted.

and the general property in the four partners. These four partners then proceeded to make an arrangement amongst themselves. Two were resident here, and the other two, Allison and Porro, resided abroad; and the partners here desired to find some machinery by which the property of the non-resident partners might be transferred to the two who were resident in England. Allison had given a power of attorney to Williams, who executed the deeds of dissolution in the name of Allison, purporting to act under this power of attorney. Allison subsequently came to this country, and he then ratified the assignment to the plaintiff; and his portion of the property may, therefore, be treated as duly assigned to the plaintiff. Porro, the other partner, granted a power of attorney to Newton, which begins by saying that Porro constitutes Newton his attorney "for the purpose of exercising, for me, all or any of the powers and privileges conferred by a certain indenture of partnership constituting the firm of B. Williams & Co." This deed of partnership has not been produced. The power of attorney then authorizes Newton, in general words, "generally to do, execute, and perform any other act, deed, matter, or thing whatsoever," &c., &c. Under this power Newton has purported to assign Porro's share in the partnership property to the plaintiff.

The first question is, whether this assignment of Porro's share is good? I think it is not. The special terms of the first part of the power prevent the general words from having an unrestricted general effect. The meaning of the general words is cut down by the context in accordance with the ordinary rule of ejusdem generis. This general principle is laid down in *Arlington* v. *Merricke*. (1) I think, therefore, that the general provisions in the power of attorney did not confer the right to dissolve the partnership and to transfer Porro's share to the plaintiff. Consequently, the assignment to the plaintiff did not pass the property in Porro's share of the goods. This portion, therefore, of the property in the goods remained in Porro. The deed of assignment to the plaintiff, in trust for the creditors of Williams and Newton, was not assented to so as to be a deed under the Bankruptcy Act, 1861, s. 192; but there is no reason why, at common law, it should not pass to the plaintiff such property as was possessed by the grantors. By

(1) 2 Wms. Saunders, 411a.

1870

HARPER v. GODSELL.

this deed of assignment the plaintiff became tenant in common with Porro of the pledged goods. The plaintiff then offered to redeem the goods, and I assume, for the purposes of this question, that the right sum was duly offered subject only to the question whether the plaintiff was entitled to redeem the goods. I think there was plenty of evidence to shew a refusal by the defendant to deliver the goods, which would be a conversion, if the plaintiff is the proper person to maintain this action. (1) But when the plaintiff sought to put an end to the pledge, he could at most only do so as to his interest in it. As to the rest of the interest in the goods, he was tenant in common, or joint tenant (it is not much matter which), with Porro. Now it is a principle as old as Littleton (Co. Litt. 200 a.), that one joint tenant cannot maintain trover against his co-tenant for the goods while they are in the co-tenant's possession. When the property is wrongfully destroyed, the action may be maintained. Here the wine was sold under the power of sale, as it had not been redeemed. It was not destroyed. If Porro himself had sold the wine the plaintiff could not have sued him in trover for so doing, and as the defendant sold the wine under an authority from Porro, I think the plaintiff cannot sue the defendant in trover for so selling the wine. I think, under these circumstances, that the plaintiff cannot maintain trover for the goods in question.

As to the surplus of the proceeds of the sale of the wine, the defendant must, doubtless, account to the estate of the firm. All we decide at present is, that this action cannot be maintained on this one ground, that it was a mistake to think that the remedy was in trover. I think, therefore, that the nonsuit was right, and that this rule must be discharged.

MELLOR, J. I am of the same opinion. The plaintiff, by the deed of assignment, obtained a portion of the property in the goods subject to the terms of the pledge. It appears to me that he was not in a position to make a demand for the redemption of those goods without the other party, so as to fix the defendant with liability to an action of trover. The defendant had a right to see if the person claiming the whole of the goods was entitled to the whole of them. It is to be noticed that there was no demand of a portion

(1) See ante, p. 426, n.

1870

HARPER v. GODSELL.

only of the goods: the whole of them were claimed. It is said that this objection to the plaintiff's right to recover in trover was not taken before; but if it had been taken, it could not have been avoided. As to the other point, I think it clear that the power of attorney refers only to things done in furtherance of partnership purposes, and that it does not extend to give a power to dissolve the partnership. I agree, therefore, with my Brother Blackburn, that the nonsuit ought to stand, and that this rule should be discharged.

Rule discharged.

Attorneys for plaintiff: *Harper, Broad, & Manly.*
Attorney for defendant: *Sorrell.*

SMITH *v.* MYERS AND ANOTHER.

June 15.

Contract of Sale, of Cargo "expected to arrive" by a particular Ship.

The defendants' correspondents at Valparaiso bought on their account 600 tons of nitrate of soda, and on the 16th of July they chartered the barque *Precursor* to bring it to England; the defendants being informed of this, on the 8th of September made the following contract, through brokers, with the plaintiff:—"We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12*s.* 9*d.* per cwt. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." In the meantime, on the 13th of August, an earthquake had destroyed the greater part of the nitrate of soda while lying at the port of lading; and, on the 2nd of September, the Valparaiso house had cancelled the charter of the *Precursor*. Afterwards, on learning from the defendants that they had sold the nitrate to arrive, but not on what terms, they purchased other 600 tons of nitrate at above the defendants' limit, and obtained a transfer of a charter of the same barque *Precursor*, and shipped the nitrate about the 23rd of December to the defendants, to enable them to execute their contract if obliged to do so, or to sell at a profit, if free. The *Precursor* arrived in England on the 8th of May; and the defendants, having in January sold to other parties the soda to arrive, refused to deliver to the plaintiff, on which he brought an action on the contract of the 8th of September:—

Held, that the contract, though not for a specific lot of nitrate of soda, was for a specific adventure or voyage which both parties contemplated as about to take place; and that this second lot was not within the contract.

DECLARATION, for not delivering 600 tons of nitrate of soda, expected to arrive per *Precursor*, pursuant to a contract of sale (setting it out).

1870

SMITH v. MYERS.

Pleas, inter alia: 1. A traverse of the contract as alleged. 2. That the shipment of the nitrate of soda was prevented by circumstances and accidents within the true intent of the contract, viz., by the soda being destroyed by an inundation caused by an earthquake at the port of loading, and that no parcel of nitrate of soda within the true meaning of the contract arrived as alleged.

Issue joined.

At the trial, before Hayes, J., at the Liverpool summer assizes, 1869, it appeared by evidence and mutual admissions, that the defendants are merchants at Liverpool, under the firm of Myers, Son, & Co., and are also partners in the firm of Myers, Bland, & Co., of Valparaiso.

On the 15th of July, 1868, Myers, Bland, & Co., purchased 600 tons of nitrate of soda from Cross & Co., pursuant to orders from the defendants, and on the 16th of July they chartered the barque *Precursor* to bring it to England. On the 13th of August an earthquake occurred, and the inundation caused by it destroyed the greater part of the 600 tons of nitrate of soda then lying at Iquique, the port of loading. Some dispute arose as to whether Cross & Co., the sellers, were bound to supply other soda under their contract, and on the 1st of September it was decided by arbitration (pursuant to the terms of the contract), that they were not so bound; on this decision being given, on the 2nd of September, Myers, Bland, & Co. cancelled the charter of the *Precursor* by agreement with the captain.

In the meantime, on the receipt of advice from Myers, Bland, & Co., of the purchase of the soda and the charter of the *Precursor*, the defendants, being ignorant of the destruction of the soda and the cancellation of the charter, directed their brokers to sell the nitrate of soda to arrive; and the brokers, on the 8th of September, sold to the plaintiff, a merchant at Bristol, through other brokers, in the ordinary course, by the following note, which was the contract declared upon and set out in terms in the declaration:—"Liverpool, September 8, 1868. Messrs. William Smith & Co. We have this day sold to you on account of Messrs. Myers, Son, & Co. about 600 tons (say, six hundred) more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12*s.* 9*d.* per cwt. from the quay.

1870

SMITH v. MYERS.

. . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void. Buyers to have the option of sending the vessel into any safe port in the United Kingdom." The defendants wrote to Myers, Bland, & Co., saying they had sold to the plaintiff the nitrate "to arrive," but not stating the terms of the contract; and Myers, Bland, & Co., on the receipt of the defendants' letter, being doubtful how far the defendants might still be bound to fulfil their contact with the plaintiff, bought, on the 29th of October, other 600 tons of nitrate of soda from Messrs. Cross & Co. at a higher price, and beyond the limit given by the defendants; and, on the 30th of October, they obtained from Cross & Co. a transfer of the charter of the same barque, the *Precursor*, which Cross & Co. had entered into after the cancellation of the charter by Myers, Bland, & Co., on the 2nd of September; and the soda was shipped about the 23rd of December under this second charter consigned to the defendants. On the 30th of October Myers, Bland, & Co., wrote to the defendants advising them of the intended shipment, and expressing a hope that it might either enable the defendants to fulfil their contract with the plaintiff if still compelled to do so, or if not so compelled, to effect a sale at a profit.

On the 2nd of September Myers, Bland, & Co., had written to the defendants announcing the destruction of the soda and the cancellation of the charter; and the defendants, on the receipt of this letter, on the 15th of October, wrote to the plaintiff's brokers announcing the destruction of the soda, and that the contract with the plaintiff would therefore be void. The plaintiff's brokers replied, on the 21st of October, that they did not consider themselves in any way concerned with any nitrate of soda that might have been destroyed by the earthquake, as it had nothing to do with their contract, a fulfilment of which they should expect. The defendants, however, being advised that under the circumstances they were not bound to deliver any cargo under their contract with the plaintiff; on advice of the shipment of the second cargo, sold it in January, 1869, to other parties "to arrive."

The *Precursor* arrived off Queenstown on the 8th of May with the soda, and the plaintiff demanded a delivery of the cargo, but

1870

SMITH v. MYERS.

the defendants refused to deliver it; on which this action was brought.

A verdict was taken for the plaintiff for 960*l.*, being the difference between the contract price, 12*s.* 9*d.*, and the market price 14*s.* 6*d.*, at the time of the arrival of the *Precursor*; leave being reserved to move to enter a verdict for the defendants, or a nonsuit; the Court to be at liberty to draw inferences of fact.

A rule was obtained accordingly, on the ground that the cargo which arrived was not the cargo agreed to be sold.

June 9. *R. G. Williams* shewed cause. The plaintiff, the buyer, knew nothing about the purchase of any specific nitrate of soda. The contract was, therefore, not for any specific soda, but only for a cargo of 600 tons to arrive by the *Precursor*. Nitrate answering that description arrived consigned to the defendants, and they were therefore bound to deliver it.

THE COURT then called upon

Milward, Q.C., *Mellish, Q.C.*, and *Baylis*, in support of the rule. Conceding that the contract was not for a specific cargo, but simply for a cargo to arrive by the *Precursor*, yet it is confined to a specific voyage or adventure then in contemplation: that was put an end to by the destruction of the nitrate of soda owing to the earthquake. The clause in the contract as to accidents puts this beyond doubt, even if the contract would not have been put an end to without this clause. At the time the contract was entered into there was nothing to which the contract could apply, and there was, in fact, no contract at all: *Hastie* v. *Couturier*. (1)

June 15. *Quain, Q.C.*, and *R. G. Williams*, were heard in continuation to shew cause. A contract like the present is contingent on the concurrence of three events; first, that the ship should arrive; secondly, that there should be goods on board answering the description; and, thirdly, that the goods are subject to the control of the vendors. All three concurred in the present case; and there is nothing in the contract to take it out of the general rule. The clause as to accidents is no more than is implied in

(1) 9 Ex. 102; 22 L. J. (Ex.) 299; 5 H. L. C. 673; 25 L. J. (Ex.) 253.

every such contract, and is merely nugatory: *Johnson* v. *Macdonald*. (1) The contention on the other side amounts to saying that the contract was for the specific parcel of nitrate which the defendants' agents had bought for them; but the plaintiff had no information of this purchase, and it is clear that the contract is the usual purchase "to arrive." It is a fallacy, moreover, to say this was not the voyage intended; the ship sailed the same season, and it arrived within the usual time. In *Couturier* v. *Hastie* (2), the reasons given for the judgment by the Court of Exchequer Chamber, which were assented to by the House of Lords (3), were that it was a contract for the sale of a specific cargo, which it was supposed was capable at the time of being transferred, but which turned out to have been already transferred, and therefore that the contract did not attach. Here it is conceded that the contract was not the sale of specific goods. *Lovatt* v. *Hamilton* (4) is the converse of this case: there the palm oil had been bonâ fide transhipped from the named ship to another by which it arrived, and it was held the vendee was not entitled to it.

COCKBURN, C.J. This is an action brought for the non-delivery of a cargo of nitrate of soda under a contract, by which the defendants "sold" to the plaintiff "600 tons, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*." A cargo arrived which answered the terms of the contract, and of which the defendants, the vendors in the contract, were the owners, and they refused to deliver it. The cargo, however, in question, for the non-delivery of which this action is brought, was not in existence at the date of the contract; and the contract—at all events, so far as the vendors were concerned—was a contract with respect to a cargo which, at the time of the contract, was not in existence. The defendants had become possessed of a quantity of nitrate of soda, which was intended to be shipped to England by the ship *Precursor*, and it was with reference to that quantity and cargo that the defendants entered into this contract. Before the contract was made, this nitrate of soda had perished by an earth-

(1) 9 M. & W. 600.
(2) 9 Ex. 102; 22 L. J. (Ex.) 299.
(3) 5 H. L. C. 673; 25 L. J. (Ex.) 253.
(4) 5 M. & W. 639.

1870

SMITH v. MYERS.

quake; and consequently, at the time when the contract was entered into, there was no cargo in existence upon which it could operate and take effect. But, in such a contract, though the cargo be not in existence at the time of the contract, yet if it is purchased by the vendor afterwards with a view to being shipped on board the vessel named in the contract, and that cargo is brought to England, it may well be that the contract is binding upon the vendor, and he would be liable in an action if he did not fulfil his contract by delivering the cargo; and I quite agree with the counsel for the plaintiff, that in such a case a man cannot get out of his bargain by doing something in fraud of the contract. But although such a contract as this may apply to a cargo incerti corporis, yet, it seems to me, it involves more than the mere corpus; it has reference not only to the article to be sold, or what may be called the corpus, or subject-matter, of the contract—which may be uncertain, and may be either acquired before or after—but also to the voyage; and this, as it appears to me, is of a certain and specific character, and it is upon this voyage only that the contract can operate and take effect. The corpus may be uncertain, but the navigatio is certain.

In the present case, the intended cargo had perished; but it happens that more nitrate of soda is afterwards to be had, and the defendants' correspondents purchase it, but not with any intention that the nitrate of soda so subsequently purchased should come home in the *Precursor* at all. It is a mere accident that it came home in the *Precursor*. If there had been another vessel in which it could have been brought to this country, the cargo would not have arrived by the *Precursor*, but it so happened that there was not another vessel available for the purpose. After the earthquake the defendants' original charter had been cancelled, and the *Precursor* had been chartered to other persons; and it was only because those other persons were induced to give up their charter-party that the *Precursor* became the vessel by which the after-acquired nitrate of soda was brought home. Therefore it is clear that the voyage by which the second cargo was brought to this country was an entirely different voyage from that originally intended, it being a pure accident that the cargo came by the *Precursor* at all. In a contract of this kind, granted the cargo is

incerti corporis, yet it is to arrive by a specified vessel, and there is contemplated a particular voyage; and although I go along with Mr. Quain in thinking that anything done in fraud of the contract might possibly leave the parties open to an action of some kind, still I think that this is involved in a contract like the present,—and is an essential part of the contract,—that the voyage which both parties had in their minds, and with reference to which they were making the contract, is a particular voyage, and when from some cause or other the voyage is abandoned or given up, nothing being done in fraud of the contract, the contract will not extend to a cargo of the like description which comes by the specified vessel, but on a voyage different from that contemplated by the parties. Such is the case here. The rule to enter a nonsuit must, therefore, be absolute.

MELLOR, J. I am of the same opinion. We are not embarrassed with any disputed facts. The state of circumstances really existing, and which were supposed to be existing at the time the contract in question was made, are admitted; and upon those admitted facts it appears to me that the cargo which did actually arrive was not a cargo contemplated by the contract. The contract is with respect to a cargo expected to arrive by the *Precursor*, and it appears that at that time there was a cargo expected to arrive by that ship, and therefore the voyage then contemplated was the voyage on which the contract was intended to operate; or, at all events, it was intended to operate upon nitrate of soda then at the port of lading, and about to be shipped; but by the accident of the earthquake it had become impossible at that time to ship any nitrate of soda, and the voyage in which it was intended to carry the soda from the port of lading to the port of discharge was abandoned, the charter being cancelled, and the whole matter appears to have been at an end. But the defendants' correspondents having made a fresh purchase subsequently of a quantity of nitrate of soda, by a pure accident (for that appears to be the result of the facts), that cargo came home consigned to the defendants in the same vessel; and although not on the same voyage, yet it is contended that the contract is to operate on that cargo and that voyage. But I think this cargo was not a cargo with respect to which the contract was

1870

SMITH v. MYERS.

made, and was not a cargo contemplated by the parties to the contract, and was not a cargo expected to arrive.

LUSH, J. I am of the same opinion. I agree with the counsel for the plaintiff that this was not a contract for any specific parcel of nitrate of soda. If nitrate of soda—whether it was the particular lot which the vendors had in their minds when they made the contract, or any other—had been shipped by the vendors on board that vessel for that voyage, and it had arrived, they would have been bound to deliver it to the plaintiff under this contract. But though it was not a specific contract as to the goods, I think it was specific as regards the voyage. I mean, that although it was not a contract as to a particular cargo, yet there was a particular voyage which the parties then had in contemplation. It cannot be supposed that it was the intention of either the vendors or the vendee that the vendors should be bound to deliver, or the vendee bound to accept, any cargo of nitrate of soda which should come by that ship from that port at any time after the making of the contract. That cannot have been the meaning of the parties, and the contract must, therefore, be limited to a particular adventure which the parties had in contemplation at the time the contract was made. A reference to the dates shews that at that time there was nothing upon which the contract could operate. The defendants, through their house in Valparaiso, had become possessed of this nitrate of soda in the month of July; they had chartered this particular vessel to bring it to England; the nitrate of soda had been destroyed by an earthquake on the 13th of August, and thereupon the Valparaiso house abandoned the adventure, and procured the charter to be cancelled, and there was an end of the transaction. In ignorance of this the defendants in England made the contract in question with the plaintiff on the 8th of September, after the cargo had been destroyed, and after the charter had been cancelled, and the adventure ended altogether. At that time, therefore, there was nothing upon which the contract could operate at all. Subsequently the vessel was chartered by another firm for another purpose; and the defendants' correspondents in Valparaiso, in October, bought another quantity of nitrate of soda, and, in order to send it to England, they procured

1870

SMITH v. MYERS.

from the charterers of this particular ship a transfer of the charter to them, and they shipped this fresh nitrate of soda on the defendants' account by mere accident in the same ship. This was, therefore, a different adventure from the one on which the contract with the plaintiff was intended to operate. Although it happened that goods of the same description came consigned to the defendants in the same ship, yet they were not goods which the parties were bargaining for, or which the plaintiff had a right to, or which, if the market had gone down instead of upwards, the defendants would have had a right to insist upon the plaintiff accepting. The rule will, therefore, be made absolute.

Rule absolute.

Attorneys for plaintiff: *Jones, Blaxland, & Son, for Abbot & Leonard, Bristol.*

Attorneys for defendants: *Walker & Sons, for Ellis & Field, Liverpool.*

THE BRUTON TURNPIKE TRUSTEES, APPELLANTS; THE WINCANTON HIGHWAY BOARD, RESPONDENTS.

June 11.

Trust of Turnpike Road—Application of Tolls—5 & 6 *Wm.* 4, *c.* 50, *s.* 94.

By a local Turnpike Act the tolls were to be applied, in the first place, in payment of the costs, &c., of the Act; in the next place, in paying and discharging all interest now due and owing, and which shall hereafter become due, upon any mortgage or securities of the tolls hereby granted, and in defraying the expenses of erecting toll-houses, &c., and of widening, repairing, &c., the roads; and lastly, in reducing, paying off, and discharging the several sums of money due on any mortgage or securities, and also other debts now due or hereafter to become due:—

Held, that the trustees were at liberty, under their Act, to apply the tolls in payment of arrears of interest in priority to the repairs of the road, and that the funds not being sufficient for both, no order could be made upon them by justices to contribute towards the repairs, under 5 & 6 Wm 4, c. 50, s. 94.

Reg. v. *Hutchinson* (4 E. & B. 200; 24 L. J. (M.C.) 25) distinguished.

CASE stated by Justices of Somersetshire under 20 & 21 Vict. c. 43.

An information was preferred by the surveyor of the Wincanton Highway Board against the trustees of the Bruton turnpike road, charging, that portions of certain public highways were

1870

BRUTON v. WINCANTON.

out of repair, and that such highways were part of the Bruton turnpike road, and that the trustees were chargeable with the repairs thereof, and a summons was granted under 5 & 6 Wm. 4, c. 50, s. 94.

Upon the hearing of the summons, the clerk to the trustees objected to the payment of the costs of the repairs of the roads in question, upon the ground that the justices had no power to make an order upon the trustees for payment of the expenses of the repairs unless they had funds for such purposes; and he cited *Reg.* v. *St. Alban's* (1), and *George* v. *Chambers* (2) to shew that the justices were bound to inquire into the state of the funds of the turnpike trust. Evidence was then given that, after providing for the interest then accruing in respect of moneys borrowed on the securities of the tolls, and for certain old arrears of like interest due at the end of previous years, but which had not been paid when they became due, and also for the current simple contract debts then owing from the trust, there would not be any balance in the treasurer's hands to the credit of the trust. And it further appeared that the deficiency in the trust funds was caused by the trustees having recently—indeed since the issuing of the summons—paid such old arrears of interest to the amount of 127*l.* 6*s.* 6*d.*

It was stated on behalf of the Highway Board, and found as a fact, that the unsound condition of these turnpike roads had been long known to the trustees of the Bruton turnpike trusts, who *had declined* to repair the same, on the ground of having no funds at their disposal, and it was contended that, on the authority of *Reg.* v. *Hutchinson* (3), the trustees had not any authority to pay arrears of interest in priority to the current necessary expenses of the repairs of the road; but that an adequate portion of the money so apportioned by them to such arrears ought to have been made applicable to the repairs of the roads in question.

By the Bruton Turnpike Roads Act, 1 Wm. 4, c. lxvi., after reciting, inter alia, s. 3, that the trustees for executing the former Acts had, in execution thereof, borrowed considerable sums upon the credit of the tolls, which could not be repaid, nor the roads suffi-

(1) 22 L. J. (M.C.) 142. (3) 4 E. & B. 200; 24 L. J. (M.C.) 25.
(2) 11 M. & W. 149.

ciently repaired unless further tolls, powers, and provisions be granted and made; by s. 11 certain additional tolls were granted, and by s. 12 it is enacted "that all moneys which shall arise and be produced from the tolls, granted or made payable by this Act, and all other moneys which shall arise by virtue of this Act, shall be applied in the order or manner following: that is to say, in the first place in payment of all the costs, charges, and expenses which shall have been incurred in applying for, preparing, passing, and obtaining, this Act, and otherwise relative thereto; and, in the next place, in paying and discharging all interest now due and owing, and which shall hereafter become due upon any mortgage or securities of the tolls or duties hereby granted or made payable, and in defraying the expenses of building or erecting toll-houses, toll-gates, and toll-bars with suitable outbuildings thereto, and of removing or altering the same or any of them, and other conveniences, and of altering, raising, widening, improving, repairing, and preserving the said roads, and otherwise in executing the several purposes of this Act; and lastly, in reducing, paying off, and discharging the several principal sums of money due on any such mortgage or securities as aforesaid, and also all other debts and sums now due and owing, and hereafter to become due and owing, in pursuance of this Act."

The clerk to the trustees contended that the case of *Reg.* v. *Hutchinson* (1) could not govern the decision in this case, inasmuch as by the local Act, which governed the decision of the Court of Queen's Bench in *Reg.* v *Hutchinson* (1), the trustees were ordered to apply the money received from the tolls, &c., in the first place in payment of the expenses of the Act, and the remainder, after payment of the necessary expenses of erecting toll-houses, in keeping down the interest of the principal sums borrowed, and then in amending, making, altering, &c., the roads; whereas the Bruton Act expressly provides that the money should be applied in paying and discharging all interest due and owing at the time of passing the Act, and which should thereafter become due upon any mortgage or securities of the tolls.

The justices were of opinion that the case came within the reasoning of the judgment in *Reg.* v. *Hutchinson* (1), and that they

(1) 4 E. & B. 200, 211; 24 L. J. (M.C.) 25, 30.

1870

BRUTON v. WINCANTON.

were bound by such decision, and accordingly they made an order on the trustees for payment of 58*l.* 18*s.*, which had been found to be the costs of repairs.

The question for the opinion of the Court was, whether the trustees of the Bruton turnpike road were bound to apply an adequate portion of the moneys arising from the tolls to the necessary annual current expenses of maintaining the road in repair, in preference to apportioning such moneys to the payment of arrears of interest which had been carried over from the previous years.

Pinder, for the appellants. The appellants had, at least, a discretion under s. 12 of their Act to pay arrears of interest before the repairs. The justices acted under *Reg.* v. *Hutchinson* (1); but that decision turned on the expression "keeping down" the interest, which the Court held applied only to the payment of the annual interest; but the Court expressly said that being mentioned before "the repairs," though in the same paragraph, as here, it was to take precedence of repairs; so far, therefore, that case is an authority in favour of the appellants.

F. Bailey, for the respondents. The main object of the new local Act was for repairing the road; and the judgment in *Reg.* v. *Hutchinson* (1) is in point for the respondents, that the annual interest only is to take precedence of repairs. Moreover, in *Reg.* v. *South Shields* (2), the Court point out that 13 & 14 Vict. c. 79, s. 4, overrides the local Act, and that it is only the annual interest that is to take precedence.

[BLACKBURN, J. That discretion as to paying off the principal was in favour of the mortgagees of the tolls; but the argument for the respondents tends to cut down the local Act, which the appellants say is more in favour of the mortgagees.]

Pinder, in reply. *Reg.* v. *South Shields* (2) is really against the respondents, and shews that 4 & 5 Vict. c. 59, as well as 13 & 14 Vict. c. 79, s. 4, has made no alteration in the order in which the funds of turnpike trusts are to be applied under the various local Acts, as is pointed out in *Weardale Highway Board* v. *Bainbridge*. (3)

(1) 4 E. & B. 200, 211; 24 L. J. (M.C.) 25, 30.

(2) 3 E. & B. at p. 606; 23 L. J. (M.C.) at p. 136.

(3) Law Rep. 1 Q. B. 396.

1870

BRUTON v. WINCANTON.

BLACKBURN, J. I think the justices were wrong in the construction they put upon the statute, though I regret to have to come to that conclusion, as I think it would have been better legislation had it been in accordance with the justices' view. This Turnpike Act recites that some debts were owing and interest unpaid, and that it is necessary to give further powers, and the Act then authorizes the trustees to levy tolls; and then s. 12 enacts how and in what order the moneys raised shall be appropriated. [The learned Judge read the section.] All the payments are lumped together, and this makes a difficulty in saying, as the justices have, that the tolls are to be applied in the first instance only in keeping down or paying the annual interest. After paying the costs of the Act, the moneys raised are to be applied in the next place in paying and discharging all interest now due and owing, and which shall hereafter become due upon any mortgage, and in defraying the expenses of the necessary buildings, and in improving and repairing the roads. There are some things which could not properly be charged on annual income, but these are classed together with the repairs of the roads, which would certainly be properly an annual charge. Then, lastly, the funds are to be applied to the reducing and paying off the principal sums borrowed and all other debts and sums now due and owing. At one time I thought arrears of interest might be included in this; and it certainly would have been a better scheme in my opinion, had that been so, thus applying the annual revenue to the annual charges; but it is clear that all interest is included in the second branch, and is only postponed to the expenses of the Act.

In *Reg.* v. *Hutchinson* (1), the Court intimate an opinion that the obligation to keep down the interest takes precedence of the repair of the road, because it is first mentioned. I can hardly accede to that argument, if, as here, it is mentioned in the same paragraph; but it is unnecessary to express any positive opinion upon that; the Court go on to say that the expression "keeping down the interest," only applies to paying the annual interest, and not to paying off arrears; and, therefore, that the trustees were wrong. In the present case the moneys are to be applied in the

(1) 4 E. & B. at p. 211; 24 L. J. (M.C.) at p. 30.

1870

BRUTON v. WINCANTON.

second place in paying all interest now due and hereinafter to become due, and in repairing the roads, which seems, at all events, to give the trustees the option or uncontrolled discretion to pay arrears of interest before repairs.

MELLOR, J., concurred.

LUSH, J. I am of the same opinion. The justices felt bound by the decision in *Reg.* v. *Hutchinson* (1), but that turned upon an entirely different form of words. In that case they had to deal with old arrears of interest, and the Act said nothing about them nominatim, but said the tolls should be applied in "keeping down" the interest, which the Court held only applied to the paying the annual interest, and left the arrears to be paid like other debts out of the surplus. Here the statute deals with the old arrears of interest by saying the money shall be applied in the second place in paying off all interest now due, or which shall hereafter become due; and it clearly meant that the creditors should be paid their interest before any of the money was applied to the roads.

Judgment for the appellants.

Attorneys for appellants: *Dyne & Harvey.*
Attorneys for respondents: *Whites, Renard, & Floyd.*

(1) 4 E. & B. at p. 211; 24 L. J. (M.C.) at p. 30.

TUBB, APPELLANT; GOOD, RESPONDENT. 1870

June 11.

Metropolitan Building Act (18 & 19 *Vict. c.* 122), *ss.* 3, 51—"*Owner*"—*Liability to Fees to Surveyor.*

In 1866, notice was given by a builder to the district surveyor, of his intention to erect three houses, under s. 38 of 18 & 19 Vict. c. 122 (the Metropolitan Building Act). The surveyor inspected the houses, and the roofs were covered in on the 9th of July, 1866; and on the 9th of August, 1866, the surveyor became entitled to certain fees from the "builder, owner, or occupier," under s. 51. T. first became owner in 1869; and the surveyor, after due demand, took out a summons against T. for the fees:—

Held, that "owner" meant owner for the time being when the fees became due; and that T. was, therefore, not liable.

CASE stated by one of the Metropolitan Police Magistrates, under 20 & 21 Vict. c. 43.

In May, 1866, notice was given by one Savage, a builder, to the respondent, the district surveyor of Poplar, of his intention to erect three houses in Lefevre Road, North Bow, under s. 38 of 18 & 19 Vict. c. 122 (Metropolitan Building Act). The houses were duly inspected by the respondent. The roofs of the buildings were covered in on the 9th of July, 1866. On the 9th of August, 1866, the respondent became entitled to receive 5*l.* 5*s.* as the amount of fees due to him from the builder, owner, or occupier of the buildings so erected (s. 51 of the Metropolitan Building Act). (1) The appellant was not the builder, owner, or occupier of the

(1) By 18 & 19 Vict. c. 122, s. 38, two days' notice is to be given to the district surveyor by the builder before commencing any new building; and, by s. 39, the surveyor is to survey the proposed building from time to time.

s. 51:—"At the expiration of the following periods, that is to say, of one month after the roof of any building surveyed by any district surveyor under this Act has been covered in, of fourteen days after the completion of any such work as is by this Act placed under the supervision of the district surveyor, of fourteen days after any special service in respect of any building has been performed, the district surveyor shall be entitled to receive the amount of fees due to him from the builder employed in erecting such building, or in doing such work, or in doing any matter in respect of which any special service has been performed by the surveyor, or from the owner or occupier of the building so erected or in respect of which such work has been done or service performed; and if any such builder, owner, or occupier, refuses to pay the same, such fees may be recovered in a summary manner before a justice of the peace, upon its being shewn to the satisfaction of such justice that a proper bill specifying the amount of such fees was delivered to such

1870

TUBB v. GOOD.

buildings in 1866. He became the owner prior to October, 1869. A proper bill, specifying the amount of the fees due to the respondent was delivered to the appellant on the 1st of October, 1869, which the appellant refused to pay, whereupon a summons was issued, on the 4th of February, 1870, against him as owner of the buildings, for nonpayment of the fees.

At the hearing, the appellant contended that he was not such "owner" as s. 51 of the Metropolitan Building Act contemplated, he not having been owner in 1866 or 1867. The respondent urged that there was no limit for the time of payment; and it being admitted that the appellant was the owner before and at the time the claim for fees was made he was liable for those fees.

The magistrate made an order for the payment by the appellant to the respondent of 5*l.* 5*s.*, subject to the opinion of the Court of Queen's Bench as to whether, on the facts, the decision was right in point of law.

Philbrick, for the appellants. The magistrate was wrong in making an order on the appellant; he was not the "owner" within s. 51, coupled with the definition in s. 3. "Owner" clearly must mean owner at the time when the fees became payable.

W. B. Cooper, for the respondent. The fees are payable by the builder, owner, or occupier; there can be no occupier of any unfinished building: it cannot, therefore, be intended to be confined to the owner or occupier at the time the roof is put on.

THE COURT (Blackburn, Mellor, and Lush, JJ.) were clearly of opinion that "owner" meant owner at the time the fees became due, and that the magistrate's decision was erroneous.

Judgment for the appellant.

Attorneys for appellant: *Appleby, Wright, & Crowther.*
Attorney for respondent: *Samuel Roberts.*

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builder, owner, or occupier, or sent to him in a registered letter addressed to his last known residence."

By s. 3, "owner" shall apply to every person in possession or receipt of the whole or any part of the rents and profits of any land or tenement, or in the occupation of such land or tenement other than as tenant from year to year, or for any less term, or as a tenant at will.

THE QUEEN, ON THE PROSECUTION OF THE GUARDIANS OF KINGSTON UNION, APPELLANTS; *v.* THE OVERSEERS OF ST. MARY, ISLINGTON, RESPONDENTS.

1870
June 4.

Poor—Removal—Irremoveability by Residence—Desertion of Wife and Children —24 & 25 Vict. c. 55, *s.* 3.

About thirteen years ago, in consequence of a quarrel, a man separated from his wife and daughter, and took other lodgings in the same parish, where he cohabited with another woman, by whom he had children, and resided with them up to the present time. The wife, shortly after the separation, having become chargeable to the parish, the man, under threat of legal proceedings by the parish officers, paid her 2*s.* 6*d.* a week. The wife afterwards removed with the daughter (who was eighteen years old, unemancipated, and had no settlement of her own), to another parish, where the allowance by the husband was continued, and where, after residing more than one year, mother and daughter became chargeable:—

Held, that the conduct of the man amounted to a desertion of his wife within the meaning of 24 & 25 Vict. c. 55, s. 3, and that the wife was therefore irremoveable; but that the daughter was removeable to her father's place of settlement, as the mother, by the desertion, did not become the head of the family.

UPON an appeal to the Middlesex Quarter Sessions against an order of justices for the removal of Lucy Lawrence and her daughter from the parish of St. Mary, Islington, to the Kingston Union, the sessions quashed the order, on the ground of irremoveability of the paupers, subject to the opinion of the Court on the following case.

Lucy Lawrence is the wife of John Lawrence, and the daughter, also named Lucy, is their daughter, aged eighteen, and is unemancipated; but John Lawrence and his wife have not lived together for about thirteen years past.

For more than one year next before the application for the order of removal the mother had resided in the respondents' parish of St. Mary, Islington, and, if she had been a widow during that period, would have become irremoveable from that parish. The daughter for upwards (sic) of the same period acted as a daily servant in various families in the respondents' parish, but during that time resided with her mother. John Lawrence had during the same period resided in Westminster, and had never resided in the respondent parish of St. Mary, Islington, so as to become irremoveable therefrom.

1870

THE QUEEN v. ST. MARY, ISLINGTON.

About thirteen years ago John Lawrence, and Lucy Lawrence, the mother, were living together with their children in lodgings in the parish of St. Margaret, Westminster, when, various disagreements having arisen between them, in consequence of his having formed an intimacy with another woman, and Lucy Lawrence having attempted on one occasion to stab her husband, he obtained a warrant against her, upon which she was bound over to keep the peace towards him. The husband then took other lodgings for himself and the children, and left his wife, Lucy Lawrence, in the lodgings the whole family had previously occupied, where she remained until she removed into the respondent parish. The husband and wife have not lived together since this time, but the husband has continued to live ever since, and is still living, with the woman about whom the disagreement between him and his wife had taken place, and by whom he has since had children.

John Lawrence did not at first make his wife any allowance for her maintenance, but, she having shortly afterwards become chargeable to the parish of St. Margaret, the officers threatened him with legal proceedings if he did not maintain her, and he then, in order to prevent such proceedings, agreed to allow her 2*s.* 6*d.* a week towards her maintenance, which he paid up to the time of the making the order of removal.

Neither the mother nor the daughter has any other settlement than the settlement of John Lawrence, which is in the appellant union.

It was contended on behalf of the appellants that each of the paupers was irremoveable from the respondents' parish on the ground, first, that the mother had been deserted by her husband thirteen years ago, and, after his desertion, had resided for one year in such a manner as would, if she had been a widow, have rendered her exempt from removal, and that she had therefore become irremoveable by virtue of 24 & 25 Vict. c. 55, s. 3 (as amended by 29 & 30 Vict. c. 113, s. 17); and secondly, that the daughter, for the following reasons, or some or one of them, had become irremoveable. First, that the daughter had resided in the respondents' parish, as before stated, for more than twelve calendar months; secondly, that she was residing with her mother, who was alleged to be irremoveable, and therefore became irremoveable by

virtue of 11 & 12 Vict. c. 111; and thirdly, that she being above the age of sixteen years, the relief given to her was not relief given to her father, and that her father not being in receipt of relief, except so far as relief to his wife was relief to him, would not, if residing in the respondents' parish, have been removeable therefrom.

It was contended, on behalf of the respondents, first, that neither of the paupers was irremoveable, inasmuch as the mother had not become irremovable as contended by the appellants, she not having been deserted within the meaning of 24 & 25 Vict. c. 55, s. 3; and, secondly, that the daughter was removeable on the ground that even if her mother had become irremoveable, the daughter being under the age of twenty-one years and unemancipated, and having no other settlement than that of her father; was removeable by virtue of 11 & 12 Vict. c. 111, because her father was removeable.

The questions for the opinion of the Court were: first, whether the mother was deserted by her husband within the meaning of 24 & 25 Vict. c. 55, s. 3; secondly, whether the daughter was irremoveable from the respondents' parish; thirdly, whether the court of quarter sessions had power to quash the order of removal as to one of the paupers and confirm it as to the other.

Field, Q.C., for the appellants. The first question is, whether the wife has been deserted within the meaning of s. 3 of 24 & 25 Vict. c. 55. (1) Here there is every element of desertion. The husband has formed a connection with another woman, has children by her, and they have all for some years lived together, so that he has a separate habitation from his wife. It is true he has maintained her, but that is under compulsion. The weekly allowance is paid to her, not at the instance of the wife but of third persons; that does not alter the character of the desertion. Secondly, the mother having been deserted and having become

(1) 24 & 25 Vict. c. 55, s. 3:—"Where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years [reduced to one year by 29 & 30 Vict. c. 113, s. 17], in such manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her."

1870

THE QUEEN v. ST. MARY, ISLINGTON.

irremoveable, the daughter is irremoveable by virtue of 11 & 12 Vict. c. 111. (1)

Poland, for the respondents. The daughter is removeable as she follows her father's settlement.

[COCKBURN, C.J. The desertion by the father does not make the mother the head of the family. I am very sorry to say that we must hold that the daughter is removeable.]

Secondly, there was no desertion of the wife within the meaning of 24 & 25 Vict. c. 55, s. 3. The husband left his wife on account of her violence; and, besides, a man cannot be said to have deserted his wife when he maintains her. Conceding that the allowance for the wife's maintenance was obtained compulsorily by the parish officers of St. Margaret when the wife left that parish and removed to St. Mary, Islington, the payment was no longer compulsory, but a voluntary payment.

COCKBURN, C.J. The second point has been disposed of during the argument.

The question remains whether the mother has been deserted within the meaning of the statute. The husband has left his wife partly because he is carrying on an illicit intercourse with another woman, and partly because she assaulted him; but I think the circumstances under which the wife was left are sufficient to constitute a desertion within the meaning of 24 & 25 Vict. c. 55, s. 3. Then, does the payment of the 2*s.* 6*d.* a week make any difference in the wife's position? I think it clearly does not. It is not pursuant to a voluntary arrangement with his wife that he pays her 2*s.* 6*d.* a week. In consequence of her having been left by the husband she is under the necessity of applying to the parish for relief, and the parish authorities threaten the husband with legal proceedings, and he comes to terms with the parish officers and agrees to pay his wife 2*s.* 6*d.* a week; but this payment does not

(1) 11 & 12 Vict. c. 111:—"Provided always that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removeable from any parish or place from which he or she would be removeable, notwithstanding any provisions of the recited Act [9 & 10 Vict. c. 66], and should not be removeable from any parish or place from which he or she would not be removeable by reason of any provision in the recited Act."

alter the character of the husband's conduct, which without this circumstance is clearly desertion within the statute; she is, therefore, irremoveable.

LUSH, J. I am of the same opinion. The payment of 2*s.* 6*d.* per week saves the husband from being punished as a rogue and vagabond, but it does not alter the character of the desertion.

Order of sessions affirmed, and order of removal quashed, as to the wife; order of sessions quashed, and order of removal affirmed, as to the daughter.

Attorney for appellants: *Bartrop.*
Attorney for respondents: *Sparling.*

CALLISHER *v.* BISCHOFFSHEIM.

June 6.

Consideration—Forbearance to sue—Compromise of Liability—Demurrer.

The compromise of a disputed claim made bonâ fide is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded.

Declaration, that the plaintiff had alleged that certain moneys were due to him from the Government of H., and was about to take proceedings to enforce payment, and thereupon, in consideration that the plaintiff would forbear taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain debentures. Breach, that defendant did not deliver the debentures.

Plea, that at the time of making the agreement no money was due to the plaintiff from the Government of H.:—

Held, on demurrer, that the plea was no answer to the declaration.

DECLARATION, that the plaintiff had alleged that certain moneys were due and owing to him, to wit, from the Government of Honduras, and from Don Carlos Gattierez, and others, and had threatened and was about to take legal proceedings against the said government and persons to enforce payment of the same; and thereupon, in consideration that the plaintiff would forbear from taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain securities, to wit, bonds or debentures, called Honduras Railway Loan Bonds, for sums to the

1870

CALLISHER v. BISCHOFFSHEIM.

amount of 600*l.*, immediately the bonds should be printed. Averment, that the plaintiff did not take any proceedings during the agreed period, or at all; and that all conditions had been fulfilled necessary to entitle him to sue in respect of the matters before stated. Breach, that the defendant had not delivered to the plaintiff the bonds, or any of them.

Plea, that at the time of making the alleged agreement no moneys were due and owing to the plaintiff from the government and other persons.

Demurrer and joinder.

James, Q.C. (*Rose* with him), in support of the demurrer. The plea is bad, and affords no answer to the declaration, which discloses a good cause of action. The consideration for the plaintiff's promise or contract is sufficient; it is sufficient if the contractor, or some third person, avoids some detriment or injury; here the annoyance and expense of an action are avoided. In *Llewellyn* v. *Llewellyn* (1) the declaration alleged that there were disputes concerning accounts between the plaintiff and defendant, and in consideration that the plaintiff would relinquish all claims the defendant promised he would pay the plaintiff an annuity. There was no allegation that any sum was due to the plaintiff; it might be that the plaintiff's claim could not be sustained; but it was held that the declaration disclosed a sufficient consideration.

[BLACKBURN, J. We must assume, on this record, that the plaintiff believed that he had a valid claim against the Honduras Government.]

Cook v. *Wright* (2) is in point. There the defendant knew he was not liable to satisfy the claim made by the plaintiff; but the plaintiff, bonâ fide believing him to be personally liable, threatened to take proceedings, and a forbearing to take those proceedings was held a good consideration for the defendant compromising the claim by giving promissory notes. In *Wade* v. *Simeon* (3) it was expressly averred in the plea that the plaintiff knew he had no cause of action, and it was therefore held good. The plaintiff has fulfilled his part of the contract, he has abstained from enforcing

(1) 3 D. & L. 318; 15 L. J. (Q.B.) 4. (2) 1 B. & S. 559; 30 L. J. (Q.B.) 321.
(3) 3 D. & L. 587; 2 C. B. 548.

his claim whether good or bad, and the defendant ought not to be allowed to say he will not fulfil his contract. The position of the parties is altered, and the plaintiff may have been put to expense in stopping the proceedings. The consideration is not an abandonment of an unfounded claim, but a postponement of the prosecution of the suit.

Pollock, Q.C. (*Joyce* with him), contrà. Forbearance to prosecute a groundless action affords no consideration capable of supporting a promise. It is admitted on the record that no money was due to the plaintiff from the Honduras Government, and if the declaration and plea are read together, it is clear that a cause of action does not exist. All the cases are consistent with this view except *Cook* v. *Wright* (1); and that case is distinguishable. There the question was not whether a sum of money was due to the plaintiff, but whether it was due from the defendant or another person; whereas here the question, before the contract declared on was made, was whether a sum of money was due to the plaintiff from the Honduras Government. In *Edwards* v. *Baugh* (2) the declaration was held bad because there was not any allegation that a debt was due, but merely that a dispute existed respecting it; and in *Wade* v. *Simeon* (3) it was held that forbearance to prosecute a groundless claim gave no benefit to the promisor, and imposed no detriment on the promisee.

James, Q.C., replied.

COCKBURN, C.J. Our judgment must be for the plaintiff. No doubt it must be taken that there was, in fact, no claim by the plaintiff against the Honduras Government which could be prosecuted by legal proceedings to a successful issue; but this does not vitiate the contract and destroy the validity of what is alleged as the consideration. The authorities clearly establish that if an agreement is made to compromise a disputed claim, forbearance to sue in respect of that claim is a good consideration; and whether proceedings to enforce the disputed claim have or have not been instituted makes no difference. If the defendant's contention were adopted, it would result that in no case of a doubtful claim could

(1) 1 B. & S. 559; 30 L. J. (Q.B.) 321. (2) 11 M. & W. 641.
(3) 2 C. B. 548.

1870

CALLISHER v. BISCHOFFSHEIM.

a compromise be enforced. Every day a compromise is effected on the ground that the party making it has a chance of succeeding in it, and if he bonâ fide believes he has a fair chance of success, he has a reasonable ground for suing, and his forbearance to sue will constitute a good consideration. When such a person forbears to sue he gives up what he believes to be a right of action, and the other party gets an advantage, and, instead of being annoyed with an action, he escapes from the vexations incident to it. The defendant's contention is unsupported by authority.

It would be another matter if a person made a claim which he knew to be unfounded, and, by a compromise, derived an advantage under it: in that case his conduct would be fraudulent. If the plea had alleged that the plaintiff knew he had no real claim against the Honduras Government, that would have been an answer to the action.

BLACKBURN, J. I am of the same opinion. The declaration, as it stands, in effect states that the plaintiff, having alleged that certain moneys were due to him from the Honduras Government, was about to enforce payment, and the defendant suggested that the plaintiff's claim, whether good or bad, should stand over. So far, the agreement was a reasonable one. The plea, however, alleges that at the time of making the agreement no money was due. If we are to infer that the plaintiff believed that some money was due to him, his claim was honest, and the compromise of that claim would be binding, and would form a good consideration, although the plaintiff, if he had prosecuted his original claim, would have been defeated. This case is decided by *Cook* v. *Wright*. (1) In that case it appeared from the evidence that the defendant knew that the original claim of the plaintiff was invalid, yet he was held liable, as the plaintiff believed his claim to be good. The Court say (2) that "the real consideration depends on the reality of the claim made, and the bona fides of the compromise." If the plaintiff's claim against the Honduras Government was not bonâ fide, this ought to have been alleged in the plea; but no such allegation appears.

(1) 1 B. & S. 559, 570; 30 L. J. (Q.B.) 321, 324.

(2) 1 B. & S. at p. 570; 30 L. J. (Q.B.) at p. 324.

MELLOR, J. I am of the same opinion. If the plaintiff's claim against the Honduras Government was fraudulent, the defendant ought to have alleged it.

LUSH, J., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *G. S. & H. Brandon.*
Attorneys for defendant: *Baxter, Rose, Norton, & Co.*

HILL, APPELLANT; BROWNING, RESPONDENT.

June 7.

Bread, Sale of otherwise than by Weight—6 & 7 *Wm.* 4, *c.* 37, *s.* 4.

By 6 & 7 Wm. 4, c. 37, s. 4, any baker, or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, shall forfeit a certain penalty. The practice of the appellant was to sell loaves of bread at 6*d.*, varying the weight of the loaf with the price of corn. When he purposed to sell a 3½ lb. loaf for 6*d.*, the custom in his bakery was to put into the oven 4 lbs. of dough, but the loaf was not weighed after baking. The appellant sold, at 6*d.* each, six loaves, which varied in weight; but all, but one, weighed over 3½ lbs.:—

Held, that the appellant was rightly convicted of selling bread otherwise than by weight.

CASE stated by Justices of Lancashire, under 20 & 21 Vict. c. 43.

An information was preferred by the respondent, the inspector of weights and measures for the parish of South Kilworth, against the appellant, a baker and seller of bread, under s. 4 of 6 & 7 Wm. 4, c. 37 (1), which charged that the appellant did on, &c., at, &c., sell bread otherwise than by weight; and the appellant was convicted of the offence.

Upon the hearing of the information it was proved on the part of the respondent, and found as a fact, that on the 16th of August, 1869, he was in the village of Lilbourne inspecting weights and measures; that he there saw the appellant's journeyman, Thomas

(1) 6 & 7 Wm. 4, c. 37, s. 4:—"That from and after the commencement of this Act all bread sold beyond the limits aforesaid shall be sold by the several bakers or sellers of bread respectively by weight, and in case any baker or seller of bread shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall, for every such offence, forfeit and pay any sum not exceeding 40*s.*

"The limits aforesaid are 'the city of London and liberties thereof, and beyond the weekly bills of mortality, and ten miles of the Royal Exchange.'"

1870

HILL v. BROWNING.

Moore, with a horse and cart delivering bread; that he asked Moore to produce his scales and weights, which he did, and which were correct. The respondent then asked him what he was selling his bread at. Moore said 5½*d.* ready money, and 6*d.* trust. The respondent then asked what the weight of the bread was, and Moore replied, "I don't know, I'll shew you;" and he then weighed a cottage loaf in the cart, and it weighed 3 lbs. 9 ozs.; he then weighed a batch loaf, which weighed 3 lbs. 12 ozs. Moore then said again, "We sell our bread 5½*d.* ready money, and 6*d.* trust," and he afterwards said, "We are selling our loaves at 3½ lbs." Moore then went into Mary Lee's house with six batch loaves in a basket; he did not take the scales in with him, nor did he weigh the loaves outside; he did not deliver at Lee's either of the loaves he had weighed previously in the cart; he came out with an empty basket a quarter of an hour afterwards; when Moore had gone out of sight, the respondent went into Mary Lee's house and weighed six loaves that were on the table. The loaves weighed respectively 3 lbs. 10 ozs. 3 dms., 3 lbs. 7 ozs. 3½ dms., 3 lbs. 11 ozs. 9½ dms., 3 lbs. 11 ozs. 3 dms., 3 lbs. 12 ozs. 8 dms., 3 lbs. 12 ozs. 10 dms.

It was proved by Mary Lee that Moore brought the six loaves to her house about four o'clock on the 16th of August. She was upstairs at the time, and ordered her little girl to take them in. She did not see nor speak to Moore herself, nor did she hear what passed when Moore came in. She dealt on credit, and had a bill once a month; the bill for those loaves had not yet come in. She saw the cart in the street. The respondent went in after the baker had left, and she saw him examine the loaves which had been left; they stood on the table; he was weighing the bread when she came downstairs. There were several people there in the house. She was quite out of bread before the baker came. She did not always buy the same size loaf, but the size was according to the price they were selling bread at; it was the best bread at the price that came into Lilbourne. The price of the 4 lb. loaf at Lilbourne was at the time 6½*d.* The appellant's loaves were 5½*d.* ready money. She did not expect the appellant's loaf to weigh 4 lbs.; the respondent left the bread after he had weighed it. She had dealt with the appellant twelve or thirteen years. His custom was always to keep his loaves at the same price, 5½*d.* ready money, and 6*d.* credit, and to vary the weight according to the market. She knew that, and dealt on that system. She had weighed the bread after the man had gone, but not latterly, and according to the price she found she had as much bread as she was entitled according to the market.

It was contended, on behalf of the appellant, that no offence under the Act had been proved against the appellant. No evidence had been given by the respondent to shew what passed at Mrs. Lee's at the time of the sale and delivery of the loaves; that

1870

HILL v. BROWNING.

there was no evidence to shew a sale otherwise than by weight. It was further contended that the evidence proved a sale by weight; that the appellant's man had weighed the dough before it was baked so as to insure that every loaf should weigh more than 3½ lbs., which was the weight he was then selling; that the respondent had not given any evidence to shew that any of the loaves weighed less than 3½ lbs. when delivered at Mrs. Lee's house; that the appellant's man would prove that a loaf weighed into the oven at 4 lbs. would not shrink 8 ozs. unless it were pulled, and that all the loaves delivered at Mrs. Lee's were perfect; that, according to the evidence of the respondent, the average weight of each loaf a quarter of an hour after they were delivered was more than 3½ lbs.; that the appellant had supplied his man with the weight he was then selling, and had given him proper instructions; that there was no evidence of a sale by denomination; that the appellant's system was fair, well known to, and approved by, his customers.

Thomas Moore proved—I am foreman to defendant. I was in Lilbourne on the day in question. I often take out as much as 400 loaves a day. Browning said, "How's your bread?" I did not make any answer, but took up the balance and weighed a loaf, and then I said 3½ lbs.; it weighed over. I said the weight of my bread to-day is 3½ lbs., and the price is 6*d.*; if you like to take it for ready money you can have it for 5½*d.* I do not recollect that I received orders from my master as to it, but bread had just risen in price, and we had just altered it; alterations are made from time to time, according to the market, and I am provided from time to time with the weight sold, and to tell the customers if required. The customers very seldom ask the weight, but do sometimes. I do not recollect any one asking me to weigh the bread. We put in the oven for a 3½ lbs. loaf 4 lbs. of dough. I did it that day myself. On that day there were about 300 loaves in the batch; it takes about forty minutes to set the batch in, and thirty minutes to take it out. Those loaves put in first come out last, and that causes the variation in weight between the loaves, and we get a variation of from 1 oz. to 3 ozs. A loaf could not sink 8 ozs. unless in a bad season, when they stick and pull off one from another. We deliver our loaves as other bakers, by one man. If every loaf had to be weighed one man could not do the work of delivery in a reasonable time, and the price of the bread would be increased. All the loaves were perfect delivered to Mary Lee.

Upon these facts, and upon the authority of *Jones* v. *Huxtable* (1), the justices decided that the appellant sold bread by denomination and not by weight, and convicted him.

The question for the Court is, whether this conviction was right.

(1) Law Rep. 2 Q. B. 460.

1870

HILL v. BROWNING.

Hensman, for the appellant. Bread may be sold of any weight and at any price, provided it be sold by weight. The statute is silent as to the mode of testing the weight. The respondent weighed the loaves a quarter of an hour after they were delivered, and only one loaf was slightly under the weight at which the appellant was selling bread that day; no evidence was given by the respondent as to the weight of the loaves at the time of delivery. On the part of the appellant it was proved that none of these loaves could possibly sink under $3\frac{1}{2}$ lbs. weight, unless a portion of one had adhered to another; and that all the loaves were perfect when delivered. These facts were quite consistent; and it must be taken that every loaf when delivered weighed the full weight the appellant professed to be selling. This is strong evidence of a sale by weight. All loaves must vary in weight more or less; but if every loaf weighs the professed weight at the least, there is no evidence of a sale otherwise than by weight. The appellant's system is to vary the weight according to the price of flour, and to charge a fixed price for every loaf. He does not, therefore, sell bread otherwise than by weight. *Jones* v. *Huxtable* (1) does not decide that every loaf must be weighed after it leaves the oven; but only that when a purchaser asks for a 4 lb. loaf and receives one substantially deficient, then, upon proof that the loaf has never been weighed after leaving the oven, the justices may come to the conclusion that such loaf was not sold by weight. Blackburn, J., expressly says, if the sale had been meant to be a sale of 4 lbs. of bread, it would not have been within the statute. Here the sale was meant to be, and in fact was, a sale of $3\frac{1}{2}$ lbs. of bread.

Merewether, for the respondent, was not heard.

MELLOR, J. I am satisfied that the conviction ought be affirmed. There was evidence before the justices that the loaves never had been weighed as bread; it was distinctly proved by the appellant's foreman that it is the custom for the appellant to put into the oven 4 lbs. of dough for a $3\frac{1}{2}$ lb. loaf. One baker may allow a certain amount for evaporation, and another a different amount; but the statute was passed to do away with all such speculations, and it enacts it shall be an offence to sell bread otherwise than by weight;

(1) Law Rep. 2 Q. B. 460.

1870

HILL v. BROWNING.

it was intended to secure to the purchaser, not the weight of a certain quantity of dough, but of bread. The bread never was weighed, and on the facts the justices were right in coming to the conclusion that the appellant did sell otherwise than by weight.

PIGOTT, B. (1) The words of the statute are, that all bread shall be sold by weight. That clearly means the baker shall not sell it by loaf but by weight. The evidence of the appellant's foreman shews that these loaves were not sold by weight. The appellant's system is a mode of averaging the weight of the bread; the loaves are of different weights and sold at one price; the very thing the statute was passed to prevent. I think the justices were right in coming to the conclusion that the appellant did not sell bread by weight.

Conviction affirmed.

Attorney for appellant: *Shoosmith, Northampton.*
Attorneys for respondent: *Austen, De Gex, & Harding.*

THE QUEEN *v.* COOPER.

June 13.

Election of Waywarden—Taking of Poll—25 *&* 26 *Vict. c.* 61, *s.* 10; 5 *&* 6 *Wm.* 4, *c.* 50, *s.* 6.

At a meeting of the vestry of the parish, on the 25th of February, 1870, to elect a waywarden (under 25 & 26 Vict. c. 61, s. 10, and 5 & 6 Wm. 4, c. 50, s. 6), L. and C. were proposed and seconded; the majority of the ratepayers present, counting each as a single vote, were in favour of L.; but it was suggested that the votes ought to be counted by giving each ratepayer his plurality of votes; and so counting the votes, the majority were in favour of C. A poll was then demanded on behalf of L.; and a poll was appointed to be taken on the 28th of February, between ten and two o'clock, at the room in which the vestry was then being held. On the 28th, several ratepayers went to the room to vote; but in consequence of a notice that C. declined to stand, no one went into the room, and no poll whatever was taken. C. was afterwards informed, by the chairman of the meeting, that he was elected by the votes of the meeting, and the chairman gave him a certificate of his election:—

Held, that C. was not elected; and that no poll having been taken after it had been duly demanded, the election was void.

AT a vestry meeting of the parish of Hathern, in the county of Leicester, holden on the 25th of February, 1870, for the purpose

(1) Pigott, B., was sitting in the second division of the Court of Queen's Bench, under the Judges Jurisdiction Act, 1870 (33 Vict. c. 6), ss. 2, 4.

1870

THE QUEEN v. COOPER.

of electing a waywarden for the coming year, Edward Lowe, the then waywarden, and John Cooper, were each proposed and seconded. (1) A vote of the persons present was then taken, and counting each present as a single vote, the majority were in favour of Lowe; but it was suggested that the plurality of votes of those present ought to be counted; and so counting the votes, the majority were in favour of Cooper. A poll was then demanded on behalf of Lowe. The chairman appointed the poll to be taken on the ensuing Monday, the 28th of February, between ten and two o'clock, at the room in which the vestry was then being held. On the 28th, several ratepayers went to the room to vote, but were informed by a notice posted on the door by the assistant-overseer, under the authority of Cooper, that "Mr. John Cooper declined to stand as waywarden." The door of the room was shut, but not fastened, and in consequence of the notice no voter attempted to go in, and no poll whatever was taken.

Cooper, though unwilling to stand as a candidate or to serve the office, was informed by the chairman of the meeting that, as there had been no poll, he was elected waywarden, and the chairman gave him a certificate of his election (2); and, in consequence, Cooper, at the first meeting of the Highway Board, took his seat and had acted as waywarden, Lowe being refused a seat at the Board.

A rule was obtained on behalf of Lowe, calling on Cooper to shew cause why a quo warranto information should not issue against him.

Smythies shewed cause. He contended that the defendant was duly elected at the vestry meeting by the second taking of the votes, and he relied on *Reg.* v. *Hillingdon* (3), and the statement in Rogers on Elections, 11th ed. p. 288, citing the *Westminster Case* (4), that a return upon show of hands was good where a poll was demanded but none came to vote. He also referred to *The Wexford Election Petition* before the Court of Common Pleas in Ireland, a report of which, however, he had not been able to find. (5)

(1) See 25 & 26 Vict. c. 61, s. 10, which virtually incorporates 5 & 6 Wm. 4, c. 50, s. 6; and 58 Geo. 3, c. 69.

(2) Under 27 & 28 Vict. c. 101, s. 19.

(3) 18 Q. B. 718.

(4) 8 Journ. 280.

(5) *Wexford Election Petition* (3 Ir. Rep. C. L. 612). In that case, at the

Cave, in support of the rule, was not heard.

1870

THE QUEEN *v.* COOPER.

COCKBURN, C.J. The defendant's counsel has failed to make out that there has been a poll properly held, assuming a poll of the whole parish was properly demanded. It seems that, in the first instance, the votes of those present were not properly taken, but afterwards the votes were taken in the manner prescribed by statute (1), giving a plurality of votes to those who were so entitled. The majority of votes so taken were in favour of Cooper. A general poll was then demanded on behalf of Lowe, and a time was fixed for taking it. In *Reg.* v. *Hillingdon* (2) a poll of those present was taken, it having been agreed by the meeting to abide the result of the poll of those present, and it was not till afterwards that a general poll was demanded: and it was decided that the chairman was not bound to grant it. Here there was no such agreement, and there was a demand of a general poll at once. Was there a general poll held? It is said it was the fault of the parishioners themselves that they did not tender their votes, the vestry-room door being unfastened; but the reason they did not go in was that, the asssistant-overseer had given notice that Cooper, one of the candidates, had retired. This notice was given bonâ fide, but there was a mistake. In point of fact, no poll was taken; and there was, therefore, no election.

MELLOR, J. Though the defendant had the votes of the meeting in his favour, when a poll of the whole parish was demanded, it was granted as of right, and what took place previously became of no effect. No poll, in fact, was taken; and I do not understand that anything was done contrary to good faith: but a poll having been demanded and none taken, there has been no election. It is said that there has been a decision of the Common

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nomination, the show of hands being in favour of A., a poll was demanded for B., and a day fixed for the poll. Afterwards A. gave out that he withdrew from the contest, and the returning officer delared B. duly elected. On a petition against B.'s election, and claiming the seat for A., the Court of Common Pleas in Ireland held that neither A. nor B. was elected, but the election was void.

(1) 58 Geo. 3, c. 69.

(2) 18 Q. B. 718.

1870

THE QUEEN v. COOPER.

Pleas in Ireland contrary to this view (1); if so, it would be an authority to which we should shew the greatest respect, but as no report of the decision, whatever it was, has been brought before us, we must act entirely independent of it.

LUSH, J. If the parishioners had abstained from voting because both parties were willing to stand by the show of hands, possibly that might have made a difference, but in the present case they were simply unintentionally misled.

HANNEN, J., concurred.

Rule absolute.

Attorneys for relator: *Eyre & Co.*
Attorneys for defendant: *Uptons, Johnson, & Co.*

June 18.

[IN THE EXCHEQUER CHAMBER.]

WEST *v.* DOBB.

6 QB 646
7 QB 506
6 LJ 753

Landlord and Tenant—Covenant not to Underlet, Assign, or part with Possession without Licence of Landlord—Clause of re-entry for Failure in the Observance or Performance of Covenant.

The plaintiff demised premises, in 1860, to T. and P., for fourteen years. The lease contained a covenant by the lessees not to underlet, assign, or otherwise part with possession of the premises without the written consent of the lessor; with a clause of re-entry if the lessees should fail in the observance or performance of any of their covenants. In a letter of the 25th of March, 1865, addressed to W., the plaintiff wrote:—"I consent for you to take the premises that T. and P. have been renting of me on the same conditions, and in accordance with their lease. This will be sufficient authority to T. and P. to transfer the lease to you on paying 75*l.* rent, due this day. P.S.—It will be necessary for you to write me accepting these terms." W. accepted the terms and entered into possession; but no formal assignment was executed to him by T. and P. W. paid rent to the plaintiff till January, 1867, when the plaintiff in answer to an application on behalf of W., wrote:—"I have no objection to consent to the trustees, Messrs. C. and H., acting for W. in respect of the premises to vest the same in their hands, similar to the transfer I allowed W. from T. and P.;" and accordingly, W. executed, on the 27th of February, 1867, a formal assignment, inter alia, of all his interest in the premises to C. and H. They entered on the same day; and in November, 1867, they parted with the possession to the defendant without the assent of the plaintiff. The

(1) See ante, p. 458, n. (5).

1870

WEST v. DOBB.

plaintiff brought ejectment on a forfeiture for a breach of the covenant not to assign, &c., without the plaintiff's written consent:—

Held (affirming the judgment of the Court of Queen's Bench), that there had been no breach of the covenant.

Quære, whether the clause of re-entry applied only to the breach of affirmative covenants, or whether it extended to negative covenants also.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to set aside a nonsuit and enter a verdict for the plaintiff. (1)

It was an action of ejectment on a forfeiture for a breach of covenant not to underlet, assign, or part with possession, without the plaintiff's written consent, in which the plaintiff was nonsuited on the ground that no breach of the contract was shewn on the facts.

The facts are fully set out in the report in the Court below; and they sufficiently appear in the head-note and judgments.

Kingdon, Q.C. (*Charles* with him), for the plaintiff, contended that Tedder and Pridham had been guilty of a breach of covenant, and had parted with the possession of the premises without the consent of the plaintiff, inasmuch as his letter to Wade shewed that he intended they should not part with the possession without a formal transfer; and, secondly, that there was a forfeiture inasmuch as the original lessees had still the legal estate in the term, and possession was given to the defendant without the plaintiff's consent.

H. T. Cole, Q.C. (*Pinder* with him), for the defendant, was not called upon.

KELLY, C.B. We are all of opinion that this action is not maintainable, and that the judgment of the Court of Queen's Bench should be affirmed. As it is an action of ejectment for a forfeiture, we must clearly see that there has been a breach of covenant on which an action might have been maintained, and that the forfeiture of the term has ensued upon the breach of covenant.

It appears that at Lady Day, 1860, the plaintiff granted a lease to Tedder and Pridham for a term of fourteen years, and the lease contains a covenant "that the lessees shall not, nor will, underlet

(1) Law Rep. 4 Q. B. 634.

1870

WEST v. DOBB.

or assign, or otherwise part with, the possession of the said demised premises, or any part thereof, without the written consent of the said William West, his heirs or assigns." The ejectment is brought on a forfeiture in respect of the breach of this covenant. There has been clearly no breach of the covenant to assign or underlet; and we must look only to the latter words of the covenant. The question is, whether Tedder and Pridham have parted with the possession of the demised premises within the meaning of the covenant without the leave and licence in writing of the plaintiff. It seems that, five years after this lease had been granted—that is, in the month of March, 1865—there had been meetings between the plaintiff, Mr. Wade, and Messrs. Tedder and Pridham, in which some understanding had been come to (what it was precisely we do not know) which led to the writing of a letter. This letter is written, not, it must always be remembered, to Tedder and Pridham, the lessees, but to Mr. Wade, whom the plaintiff was willing to accept thenceforth as his tenant; in this he merely says: "I consent for you to take the two estates that Messrs. Tedder and Pridham have been renting of me on the same conditions and in accordance with their lease. This will be an authority for them to transfer the lease to you on paying 75*l.*, being three quarters' rent due this day. P.S.—It will be necessary for you to write accepting these terms." Mr. Wade accordingly accepted these terms, and entered into possession of the premises. It is quite clear, therefore, that Wade entered into the possession of the premises under the authority which he conceived he derived, not from any act done, or to be done, by Tedder and Pridham, but under the authority of this letter; and can any human being say that there was a breach of covenant leading to a forfeiture, or occasioning a forfeiture, by Messrs. Tedder and Pridham? No doubt Tedder and Pridham were willing, and did let Wade into possession, leaving to the other parties thereafter to do any other act that might be thought necessary, in order to perfect the tenancy and the relation of landlord and tenant which was thenceforth to subsist between West and Wade. If the plaintiff desired, before Wade should even enter into possession, that there should be a written assignment, or an assignment by deed, or otherwise, it was his business to see that it was effected. The language of the letter is ex-

tremely inaccurate, and it is quite possible that these people really did not know that anything else was necessary beyond one party delivering possession to the other, and paying 75*l.* then due, and leaving to the landlord and the new tenant to settle the terms of their tenancy by any further acts they might think necessary. There is nothing to lead us to presume either that the plaintiff did or did not know that an assignment in writing was necessary; but if he did know it, and an assignment in writing was necessary to give an effect to the tenancy which he was desirous of creating between himself and Wade, it was his business to see that that was done before Wade took possession. It is impossible to say, assuming as the facts, though not distinctly proved, appear to have been, that Wade went to Tedder and Pridham with the plaintiff's letter, and obtained possession from them upon the strength of it, that there was a breach of the covenant not to part with possession. But the case does not stop there. It appears that two years after this forfeiture, as it is contended, had been incurred, after rent had been paid by Wade, and accepted by the plaintiff, and he had recognized the tenancy as existing in Wade, Wade being desirous of assigning the premises to two trustees, Chirgwin and Hamilton, the plaintiff writes this letter in January, 1867:—"I have no objection to the trustees, Messrs. Chirgwin and Hamilton, acting for Mr. Wade in respect of the two small farms, to vest the same in their hands, similar to the transfer I allowed Mr. Wade from Messrs. Tedder and Pridham." And upon this letter being written, all Wade's interest in the premises is assigned, together with Wade's personal property, to the two trustees; and after this the plaintiff claims to turn round and treat the lease as having been forfeited years before, during the whole of which time he had accepted rent from Wade, and recognized him as tenant. It is obviously contrary to all justice and common sense to say that a forfeiture, if there had been one, could be available under such circumstances. We are, therefore, clearly of opinion that there was no parting with the possession of the premises by Tedder and Pridham within the terms of the covenant; and as no other forfeiture can be made out, the plaintiff is not entitled to maintain the action, and the judgment of the Court of Queen's Bench must be affirmed.

1870

WEST v. DOBB.

I ought to observe that the suggestion of my Brother Channell is not unworthy of attention. The proviso is for re-entry "in case the lessees should fail in the observance or performance of the covenants on their part." It would seem only to refer to failure in the performance of affirmative covenants, whereas the covenant in question is a negative covenant, not to do a particular act; and it may be extremely doubtful, more particularly in a case of forfeiture, whether such a proviso would apply to a negative covenant. But I forbear from deciding the case on this ground, as it was not raised before the Court of Queen's Bench; and I am clearly of opinion that no forfeiture had been incurred.

MARTIN, B. I am of the same opinion. This is an ejectment on a condition of re-entry for an alleged breach of covenant in a lease, and the condition is, that in the event of Tedder and Pridham failing in the observance or performance of any of the covenants of the lease, the lessor should be entitled to re-enter. The covenant alleged to have been broken was, that Tedder and Pridham, their executors and administrators, would not underlet, or assign, or otherwise part with the possession of the demised premises without the written consent of the lessor. I quite agree that Mr. Kingdon was correct when he said the only thing which he could rely on as a forfeiture was what took place with regard to Wade, because Tedder and Pridham had nothing to do with what afterwards took place. Now, what did Tedder and Pridham do? It is clear they did not underlet to Wade; for that there must have been a contract, which there was not, that he should become their tenant. There was no assignment by which their whole interest was transferred, which must have been in writing, whereas there was no written transfer at all. Therefore Mr. Kingdon must rely on the other clause, or "otherwise part with the possession of the demised premises;" and if what was done was with the permission of the plaintiff, there has been no breach of the covenant. Now, on the 25th of March, 1865, West, the landlord, wrote this letter:—[The learned Judge read the letter and postscript]. It is clear that West thought there was to be a new and further contract as between him and Wade, otherwise it was quite unnecessary for him to require Wade to accept the terms. But suppose Tedder

and Pridham, on this letter being shewn to them, gave up possession to Wade, as it is clear they did, can any one say Wade did not take possession with the authority of Tedder and Pridham, or that they did not part with possession with the express consent in writing of the landlord? and they having done that, nothing which occurred afterwards would make that parting with possession a forfeiture. But it is said, on the true construction of the letter, there was only to be a parting with possession on condition that there was a conveyance of the entire interest from Tedder and Pridham to Wade. I agree with the Court of Queen's Bench that that would be a most technical construction and not the real meaning of the transaction between the parties; and it seems to me that the plaintiff consented to Wade's going into possession at once, and expected that there would afterwards be a regular conveyance; and on no rule of construction can this subsequent omission be made a breach of the covenant so as to work a forfeiture. In my judgment, therefore, no forfeiture has been incurred.

CHANNELL, B. I am also of opinion that the judgment should be affirmed. There can be no forfeiture, and the term must still remain in force unless this proviso for re-entry applies. And it appears to me pretty clear that the proviso applies only to the breach of an affirmative covenant. The covenant in question is a negative covenant, and therefore, the case would not be brought within the operation of the proviso. I, however, agree with the Lord Chief Baron, that as there may be some doubt in the matter, and that point was not made before the Court of Queen's Bench, it would be unwise to decide the case on that ground; and I agree with the Lord Chief Baron, and my Brother Martin, in affirming the judgment on the ground that there has been no breach of the covenant.

KEATING, MONTAGUE SMITH, and BRETT, JJ., and CLEASBY, B., concurred on the grounds stated by the Lord Chief Baron and Martin, B.

Judgment affirmed.

Attorneys for plaintiffs: *Coode, Kingdon, & Cotton, for Shilson, Coode, & Co., St. Austell.*

Attorneys for defendant: *Hooke & Street, for Cock, Truro.*

1870
June 30.

THE QUEEN *v.* THE JUSTICES OF SURREY.

Highway—Certificate that Highway be no longer repaired by Parish—27 & 28 *Vict. c.* 101, *s.* 21; 5 & 6 *Wm.* 4, *c.* 50, *s.* 85—*Notices Condition precedent to Justices' Jurisdiction—Certiorari, where a Discretionary Writ—Party aggrieved.*

There were three roads, each in a different parish, running from three turnpike roads, and forming, by their junction together, a figure like a capital Y. The three limbs met at D., and the ends of the limbs met the turnpike roads at A, B, and C. On application by the highway board of the district two justices made a separate certificate as to each road (under 27 & 28 Vict. c. 101, s. 21, which incorporates 5 & 6 Wm. 4, c. 50, ss. 84—91), that the road from D to A, from D to B, and from D to C, was unnecessary. These certificates were affirmed on appeal by orders of quarter sessions, and it was ordered that the roads should cease to be repaired by the parishes.

E., an inhabitant of one of the parishes, and living in the neighbourhood of the roads, obtained a rule for a certiorari to bring up the orders and certificates for the purpose of quashing them on the ground that they were void by reason of the notices not having been affixed at the places required by law.

By 5 & 6 Wm. 4, c. 50, s. 85, after their view and before making their certificate, the justices are to direct the surveyor to affix a notice in form No. 19 at the place and by the side of *each end* of the highway from whence the same is proposed to be diverted or stopped up, &c., *and such notices having been published*, and proof thereof given, the justices shall proceed to certify.

A notice had been posted at A, B, C, respectively, but no notice at all had been posted at D:—

Held, that the actual publication of the prescribed notices at *each end* of the road to be dealt with was a condition precedent to the jurisdiction of the two justices; and that, although the roads formed one system, yet each of the roads having been treated as a separate road, this condition had not been fulfilled, and the orders were therefore void as made without jurisdiction.

Held, also, that, though a certiorari is not a writ of course, yet as the applicant had by reason of his local situation a peculiar grievance of his own, and was not merely applying as one of the public, he was entitled to the writ ex debito justitiæ.

Rule, calling on the Justices of Surrey, and the Blackheath Highway District Board, to shew cause why a writ of certiorari should not issue to remove into this court the orders made by the justices at a general quarter sessions holden on the 31st of December, 1869, upon four several appeals between Edward Eager and the said board touching the enrolment by the clerk of the peace of four several certificates of two justices, and also the said four certificates, upon the ground that the certificates are void,

1870

THE QUEEN v. JUSTICES OF SURREY.

and that the several notices required by the statutes were not affixed at the places required by law. At the instance of J. S. Elliott.

The rule was obtained on four several affidavits of J. S. Elliott, who described himself as of Pain's Hill, Bramley, in the county of Surrey; and it appeared from the plans annexed that Pain's Hill was in the immediate neighbourhood of the roads to which the certificates related. The certificates were made under 27 & 28 Vict. c. 101, s. 21 (1); and each certified that a certain road mentioned therein was unnecessary, and each order directed that the road should cease to be a highway which the parish in which it was situate should be liable to repair.

The facts and the objection of the want of notices are sufficiently stated in the judgment of the Court.

May 11. *Robinson, Serjt.*, and *Thesiger*, shewed cause on behalf of the board. These certificates and orders were made under 27 & 28 Vict. c. 101, s. 21, that certain roads or highways were

(1) 27 & 28 Vict. c. 101, s. 21:— "When any highway board consider any highway unnecessary for public use, they may direct the district surveyor to apply to two justices to view the same, and thereupon the like proceedings shall be had as where application is made under the Highway Act, 1835 [5 & 6 Wm. 4, c. 50, ss. 84–91], to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly; and for the purpose of such proceedings under this enactment such variation shall be made in any notice, certificate, or other matter preliminary to the making of such order as the nature of the case may require."

By 5 & 6 Wm. 4, c. 50, s. 84, the chairman of a vestry may direct the surveyor of highways to apply to two justices to view any highway the vestry may deem expedient to divert or stop up. S. 85: . . . "If it shall appear upon such view of such two justices that any public highway is unnecessary, the said justices shall direct the surveyor to affix a notice in the form or to the effect of schedule No. 19 to this Act annexed, in legible characters, at the place and by the side of each end of the said highway from whence the same is proposed to be turned, diverted, or stopped up," and also to insert a notice in the newspapers, &c. . . . "And the said several notices having been so published, and proof thereof having been given to the satisfaction of the said justices, and a plan having been delivered to them," &c., "the said justices shall proceed to certify under their hands the fact of their having viewed the said highway as aforesaid," . . . and that the same is unnecessary.

1870

THE QUEEN v. JUSTICES OF SURREY.

unnecessary, and should cease to be repairable by the parishes; but the proceedings are governed by 5 & 6 Wm. 4, c. 50, s. 84—91. The three roads run from three different turnpike roads, and join one another at a place called Benbow Corner. And the objection is, that whereas s. 85 requires a notice to be affixed at each end of the road to be stopped up, &c., a notice was affixed at the end of each of the roads where it joins the turnpike road, but no notice was affixed at the other end, viz., Benbow Corner. In the first place, there has been an appeal, and this objection might have been then taken, and was not; the certificates and orders are good on the face, and the Court will not, on a motion for a certiorari, notice objections raised by affidavit, where they might have been brought before the sessions on appeal: *Reg.* v. *Cambridgeshire.* (1) Secondly, if the objection be good, the certificates and orders are made without jurisdiction, and are absolutely void, and the Court will not grant a certiorari, as it is unnecessary: *Rex* v. *Sheffield Ry. Co.* (2), and *Reg.* v. *Bristol and Exeter Ry. Co.* (3) And even if the orders were bad on the face, it is matter of discretion whether the Court will grant a certiorari or not: *Reg.* v. *Manchester and Leeds Ry. Co.* (4); at all events, when the objection does not go to the merits, and when the granting the certiorari may prejudice third persons: *Reg.* v. *Newborough.* (5) But the objection is really untenable; the three roads are practically one road, and might have been so treated, and comprised in one certificate under s. 86. And even treating them as three roads, all the notice that s. 85 requires was effectually given, for no one could pass by Benbow Corner, whichever way he went, without having passed two notices, one where he left one turnpike road, and one where he entered one of the other two turnpike roads. The present applicant, in fact, knew of all that was done; for he knew of, and was present at, the appeal, and it was only after the appeal was dismissed that he comes forward and starts this new objection.

May 12. *Gates*, in support of the rule. A writ of certiorari is not a matter of discretion, unless the applicant has been guilty of

(1) 4 Ad. & E. 111.
(2) 11 Ad. & E. 194.
(3) 11 Ad. & E. 202, n.
(4) 8 Ad. & E. 413.
(5) Law Rep. 4 Q. B. 585.

bad faith or misconduct; that was the ground of refusal in *Reg.* v. *South Holland Drainage Committee.* (1) It is clear from *Rex* v. *Horner* (2), that a certiorari is a writ of right. If the notices were not given according to the provisions of the statute, the Court, however reluctant, must grant the writ. So if it does not appear that the order was made upon view, a certiorari will be granted: *Reg.* v. *Jones* (3); or if at the time the order was made, the consent of the owner of the land over which the road is to be made has not in fact been obtained, the order is bad, and a certiorari must be granted for the purpose of quashing it. So, also, in *Rex* v. *Kenyon* (4), a technical objection was allowed to prevail, and a certiorari having issued, the order of sessions was quashed. In all these cases the certiorari was granted for formal defects, and the decision of the Court did not turn on the merits. The inference to be drawn from these authorities is, that the granting of a certiorari is a matter of right and not a matter of discretion.

[MELLOR, J. In Paley on Convictions, 5th ed. p. 412, it is stated that "though the certiorari is demandable of right by the prosecutor, it is discretionary in the Court either to grant or refuse it at the prayer of the defendant," and authorities are cited for the proposition.]

The authorities cited are not conclusive; in *Reg.* v. *Justices of Salop* (5), and also in *Reg.* v. *Pudding Norton* (6), Crompton, J., says the certiorari is a discretionary writ, but the ground of refusing the writ was in one case that the applicant by his own conduct had precluded himself from obtaining it, and in the other that his proper remedy was by appeal to the quarter sessions. The affixing of the notices is a condition precedent to the jurisdiction of the justices; and as they had no jurisdiction to act, the applicant is entitled to the certiorari.

Cur. adv. vult.

June 29. The judgment of the Court (Cockburn, C.J., Blackburn and Mellor, JJ.) was delivered by

BLACKBURN, J. This was a rule originally moved to shew cause why a certiorari should not issue to remove into this court for the

(1) 8 Ad. & E. 429.
(2) 2 B. & Ad. 150.
(3) 12 Ad. & E. 684.
(4) 6 B. & C. 640.
(5) 29 L. J. (M.C.) 39, 41.
(6) 33 L. J. (M.C.) 136.

1870

THE QUEEN v. JUSTICES OF SURREY.

purpose of quashing them, the orders of sessions made upon four appeals touching the enrolment of four certificates made by two justices of Surrey, relating to four highways in the four parishes of Alfold, Dunsfold, Bramley, and Hascomb.

The rule was refused as to the Alfold highway, but by inadvertence it was drawn up as to all four. This was admitted on the argument, and, so far as relates to the road in that parish, the rule must be discharged. But as to the other three certificates, the Court took time to consider, on a point which it is not easy to make intelligible without reference to a map. The roads in these three parishes formed one system, running from three turnpike roads, and forming a figure like that of a capital letter Y. The spot where the three limbs of this road met was called Benbow Corner. The three ends where the limbs met the respective turnpike roads may be conveniently designated as A, B, and C.

The two justices made three separate certificates. The first described the road to which it referred as a road running "from Benbow Corner" to A. The second described the road to which it referred as running "from Benbow Corner" to B. The third described the road to which it referred as running "from Benbow Corner" to C.

Each certificate, after reciting an application from the highway board requiring them to view the highway mentioned in it, which the board considered unnecessary for public use, and that they had viewed it and were of that opinion, and that they had directed the notices required by the statute to be given, and that they were satisfied that they had been given, certified that the highway named in the certificate was unnecessary for public use.

A separate appeal was lodged against the enrolment of each of these three certificates, but by agreement among the parties the three appeals were consolidated, and one jury tried the three; they found in favour of the highway board, and the quarter sessions consequently enrolled the three certificates, and ordered that the roads should cease to be highways which the parishes were liable to repair.

These certificates were made under s. 21 of the Highway Act, 1864 (27 & 28 Vict. c. 101), which directs that "the like proceeding shall be had as when an application is made under the Highway Act, 1835, to procure the stopping of any highway," mutatis mutandis.

This refers us to 5 & 6 Wm. 4, c. 50, ss. 84—91. By s. 85 it is provided, that after holding their view, the two justices shall direct the surveyor "to affix a notice in the form and to the effect in the schedule (No. 19) to this Act annexed, in legible characters at the place and by the side of each end of the said highway, from whence the same is proposed to be turned, diverted, or stopped up," and in newspapers and on the church doors, &c. "*And such notices having been so published,* and proof thereof having been given to their satisfaction, the justices shall proceed to certify."

We think it clear that the actual publication of the prescribed notices is made a condition precedent to the jurisdiction of the two justices, the obvious object of the legislature being to secure that every one interested in the preservation of the highway should be aware of what was about to be done before it was done; and we also think it clear that the legislature have prescribed that the notices shall be placed at each end of the highway, so as to secure to every one who comes upon it the opportunity of reading the notice.

In the present case the highways which it was proposed to declare no longer repairable by the parishes formed one system, consisting of three limbs, joining the points A, B, and C, and meeting at a central point, Benbow Corner. The certificates described each limb of this system as a road from Benbow Corner to A, B, and C respectively. All the notices were correctly given, except those required to be placed at each end of the road. As to these, in fact, a notice was placed at each of the three ends where the road joined the turnpike, the points A, B, C; but it was admitted that no notice was put up at Benbow Corner.

It was argued that the justices might have treated the whole system of highway from the three turnpikes as one highway, and included it in one certificate; but whether they could have done so or not, they have not done so, and each of the three orders must be treated as good or bad, just as if it was the only one; and each

1870

THE QUEEN v. JUSTICES OF SURREY.

relates to a separate highway, one end of which was at Benbow Corner, and at that end of such highway no notice was affixed.

It was then argued that what really was done gave notice to the public quite as effectually as what the statute prescribed, as no one could pass along by Benbow Corner without passing two notices, one at each turnpike road, and so getting every information which he would have got had the notice been affixed at Benbow Corner; and that the applicant, in fact, knew of all that was done, and that there had been an appeal by a party grieved to the sessions; and that it is only after the verdict of the jury was found against the appeal that he applies to this Court for a certiorari. And it was urged that the writ of certiorari was not of right, and that this Court, in its discretion, would not issue it to give effect to an objection certainly not affecting the merits.

On this we took time to consider, as the question to what extent the Court is bound to grant a certiorari, or may in its discretion withhold it, is one of great importance.

It is quite clear that, except when applied for on behalf of the Crown, the certiorari is not a writ of course. The Court must be satisfied on affidavits that there is sufficient ground for issuing it, and it must in every case be a question for the Court to decide, whether, in fact, sufficient grounds do exist. But in the present case we are satisfied that in fact no notice was affixed at Benbow Corner, and that, therefore, the orders complained of were made without jurisdiction, and the question arises whether this Court ought to refuse the certiorari.

In the very analogous case of prohibition a distinction is taken, thus expressed by Cockburn, C.J., in *Forster* v. *Forster* (1): "I entirely concur in the proposition that, although the Court will listen to a person who is a stranger, and who interferes to point out that some other court has exceeded its jurisdiction, whereby some wrong or grievance has been sustained, yet that is not ex debito justitiæ, but a matter upon which the Court may properly exercise its discretion, as distinguished from the case of a party aggrieved, who is entitled to relief ex debito justitiæ, if he suffers from the usurpation of jurisdiction by another court."

The same distinction between an application by a party

(1) 4 B. & S. at p. 199; 32 L. J. (Q.B.) at p. 314.

aggrieved and by one who comes merely as a stranger to inform the Court, is taken as to certiorari in *Arthur* v. *Commissioners of Sewers* (1), where one of the judges said "that a certiorari was not a writ of right, for if it was it could never be denied to grant it; but it has often been denied by this Court, who, upon consideration of the circumstances of cases, may deny it or grant it at discretion; so that it is not always a writ of right. It is true where a man is chosen into an office or place, by virtue whereof he has a temporal right, and is deprived thereof by an inferior jurisdiction who proceed in a summary way, in such case he is entitled to a certiorari ex debito justitiæ, because he has no other remedy, being bound by the judgment of the inferior judicature."

Where the party grieved has by his conduct precluded himself from taking an objection, the Court will not permit him to make it as in *Reg.* v. *South Holland Drainage Committee.* (2)

In other cases where the application is by the party grieved, so as to answer the same purpose as a writ of error, we think that it ought to be treated, like a writ of error, as ex debito justitiæ; but where the applicant is not a party grieved (who substantially brings error to redress his private wrong), but comes forward as one of the general public having no particular interest in the matter, the Court has a discretion, and if it thinks that no good would be done to the public by quashing the order, it is not bound to grant it at the instance of such a person. Thus in *Reg.* v. *Newborough* (3), where the application was made for a certiorari to bring up an order on the treasurer of the county of Carnarvon to pay 95*l.* 1*s.* 3*d.*, being the amount of certain allowances to, and expenses incurred in respect of, special constables, but not till after the treasurer had paid the money and his accounts had been allowed at the sessions, so that the applicants, though ratepayers, could obtain no benefit from quashing the order, as the money could never be recovered back, Lush and Hayes, JJ., then sitting in the Bail Court, thought they were not bound to grant the certiorari, though the order was informal and probably void. And we think they were right; but, as is distinctly stated by my Brother Lush, the question would have been different, if the order had

(1) 8 Mod. 331. (2) 8 Ad. & E. 429.
(3) Law Rep. 4 Q. B. 585.

1870

THE QUEEN v. JUSTICES OF SURREY.

not been acted upon, and the money paid, and the accounts allowed.

We find no case inconsistent with this distinction, which we think is a sound one, and therefore we think that, in exercising our discretion, we must see whether the present applicant is in the condition of a person grieved, applying for the certiorari to remove an order made without jurisdiction which affects his interests; and we think he is.

In *Rex* v. *Taunton St. Mary's* (1), an indictment for not repairing a highway, had been removed by certiorari, and the question was whether the prosecutors were parties grieved, so as to entitle them to costs. Lord Ellenborough says, "Certainly a person does not answer to the character of a person grieved who is only in common with the rest of the subjects inconvenienced by the nuisance; but here it appears that those persons have, by reason of their local situation, a peculiar grievance of their own."

This is exactly the position of the present applicant. And the continued existence of these orders at the quarter sessions would make it difficult to get a grand jury to find a bill of indictment against the parish, which, after all, would be an inconvenient mode of raising the objection to the validity of these orders.

The rule must therefore be made absolute so far as regards the three roads, but, as the rule must be discharged as to the other, without costs.

Rule absolute accordingly, without costs.

Attorneys for prosecution: *J. & W. Pontifex.*
Attorney for defendants: *Smallpiece.*

(1) 3 M. & S. 465, 472.

DENTON *v.* PETERS.

1870
July 6.

Pleading—Evidence—Bill of Exchange—Traverse of Indorsement—Indorser and Indorsee.

In order to constitute a valid indorsement of a bill of exchange as against the indorser, there must be a writing of the name of the holder, and a manual delivery by him of the bill with the intention, not only to pass the property in it, but to guarantee the payment if the acceptor makes default; and evidence of facts shewing the absence of this intention is admissible under a traverse of the indorsement.

BILL of exceptions to the ruling of the Assessor of the Court of Passage for the borough of Liverpool, directing the jury to find a verdict for the plaintiff on the ground that there was no evidence to go to them in support of the defendant's pleas.

The declaration was on a bill of exchange for 34*l.* 1s. drawn by the defendant and accepted by one Jones, and indorsed by the defendant to the plaintiff.

Pleas: 1. That the defendant did not indorse. 2. That the plaintiff was not the lawful holder of the bill.

The facts sufficiently appear from the judgment of the Court.

Feb. 12. *R. G. Williams*, for the defendant. It is clear that the facts afford a good defence to the action; the only question, therefore, is, whether they can be given in evidence under the traverse of the indorsement. There was no intention on the part of the defendant to pass the property in the bill so as to enable the plaintiff to sue him. It might be a good indorsement as against Jones, the acceptor, but not as against the indorser. It is not enough that there should be a writing of the indorser's name, and a delivery, but there must be an intention to pass the property: *Marston* v. *Allen* (1); and this defence may be shewn under a traverse of the indorsement: *Lloyd* v. *Howard*. (2) There was also evidence to go to the jury that the plaintiff was not the lawful holder as against the defendant. He was a mere trustee of the bill for the purpose of suing Jones, and not for the purpose of bringing an action against the defendant.

C. Russell (*Buchanan* with him), for the plaintiff. The question is not, whether there is a defence to the action, but whether it is

(1) 8 M. & W. 494. (2) 15 Q. B. 995; 20 L. J. (Q.B.) 1.

1870

DENTON v. PETERS.

raised by either of the two pleas. It has never been held that where a holding of a bill at its inception is lawful, the right to sue is divested by something that happens subsequently. The second plea is applicable to a bill payable to bearer; under it, it may be shewn that the bill has been stolen, or that the person suing upon it is not the owner in fact. It has no meaning when pleaded to a bill payable to order. If the defence is that the bill has been transferred for a certain purpose, which has been contravened, that must be specially pleaded. At the time the bill was transferred to the plaintiff he had an interest in it, and the presumption is, that the indorsement was intended to pass the property, and in order to rebut that presumption the facts destroying it must be specially pleaded. In *Marston* v. *Allen* (1) the bill, after its indorsement, was delivered merely for safe custody, and there was no intention on the part of the transferror that the transferree, or any person claiming through him, should sue on it. In *Bell* v. *Lord Ingestre* (2) there was no complete indorsement. In *Lloyd* v. *Howard* (3) the bill was indorsed for the purpose of raising money, and there was no intention that the indorsee should sue any one on it. It is not necessary that the plaintiff should be the absolute owner of the bill; it is sufficient if he have an interest in it coupled with possession. The present case falls within the principle laid down in *Ancona* v. *Marks*. (4) It is clear that there was no agreement in writing that there should be no recourse to the defendant: a mere parol agreement cannot be pleaded to vary the liability created by the indorsement: *Young* v. *Austen*. (5)

[LUSH, J. That case is not analogous; it was an action by the drawer against the acceptor.]

R. G. Williams replied.

Cur. adv. vult.

July 6. The judgment of the Court (MELLOR, LUSH, and HANNEN, JJ.) was delivered by

MELLOR, J. This was an action in the Passage Court of Liverpool on a bill of exchange for 34*l.* 1*s.* drawn by the defendant and

(1) 8 M. & W. 494.
(2) 12 Q. B. 317; 19 L. J. (Q.B.) 71.
(3) 15 Q. B. 995; 20 L. J. (Q.B.) 1.
(4) 31 L. J. (Ex.) 163; 7 H. & N. 686.
(5) Law Rep. 4 C. P. 553.

accepted by one Edward Jones, and indorsed by the defendant to the plaintiff.

The defendant pleaded that he did not indorse, and that the plaintiff was not the lawful holder of the bill.

At the trial the plaintiff produced the bill sued on, and proved that the name of the defendant indorsed on it was in the handwriting of the defendant.

The defendant then gave evidence of the following facts: The plaintiff and the defendant were partners in a speculation in currants. The defendant bought the currants, and paid for them, and re-sold them at a profit to Jones, who gave to the defendant the bill declared on in payment. The original price of the currants was settled in account between the plaintiff and defendant, and the defendant held the acceptance until maturity, when it was presented and dishonoured.

If the bill had been paid by Jones to the defendant, the latter would have been bound to hand over half of the proceeds to the plaintiff; but as it was not paid, the defendant, who had before presentment, indorsed his name on the bill, handed it to the plaintiff, and requested him to try to obtain payment from Jones, stating that Jones would be more likely to pay the plaintiff. If the plaintiff had obtained payment of the bill, he would have been bound to hand over half the proceeds to the defendant. Jones did not pay the bill to the plaintiff, and the plaintiff afterwards brought the present action against the defendant.

It was not denied on behalf of the plaintiff that these facts, if proved, established a defence to the action; but it was contended that they could not be given in evidence unless specially pleaded. We, however, are of opinion that they support the plea denying the indorsement to the plaintiff.

As against the acceptor, this would, no doubt, have been a valid indorsement. All that is necessary to give a good title as against him is the writing of the name of the holder, and a manual delivery of the bill, with intent to transfer the property in it to the indorsee, as between him and the acceptor. But as between indorser and indorsee there must be the additional element of an intent to stand in the ordinary relation of indorser, that is, to guarantee the payment if the acceptor makes default.

1870

DENTON v. PETERS.

If the defendant, after writing his name on the bill, had delivered it to a person, as his agent, to collect the money, that would not have amounted to an indorsement so as to charge the principal at the suit of the agent; and the fact, that the plaintiff was not a mere agent, but had himself an interest in the debt for which the bill was given, does not make any difference. The intention of the parties was not that the plaintiff should become the sole owner of the bill as against the defendant, but that he should hold it for the joint benefit of himself and the defendant, in whom the property as to half the bill remained.

Our judgment must, therefore, be for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Bridger & Collins.*
Attorneys for defendant: *Chester & Urquhart.*

May 31.

ALLEN *v.* GRAVES.

Contract, Evidence to support—Sale of Shares on Stock Exchange—Liability of Jobber.

The plaintiff, through G. & B., stockbrokers, entered into a contract with M., a stockjobber, for the sale of 280 shares in a company, for the next account day (the 27th of April). The shares were 50*l.* shares, on which 5*l.* was paid, and a call of 5*l.* was payable. As to 100 of the shares, M. arranged with the defendant that he should take in 100 shares at 3*l.* discount for M.; that is, on the name-day (the 26th of April), M. would be entitled to receive from the defendant a ticket containing the name and address of the person into whose name the shares should be transferred. M. was bound to deliver a similar ticket to G. & B. No such tickets were passed by the defendant to M. nor by M. to G. & B.; but an informal memorandum was delivered by the defendant to M., and by him to G. & B., and it was arranged between G. & B. and the defendant that the delivery of the name should stand over until required by G. & B. On the 27th of April the plaintiff executed (amongst others) a transfer for 100 shares, leaving the name of the transferree in blank, and transmitted it with the certificates to G. & B. On the 30th of April G. & B. paid the call, and on that day the defendant paid them the amount of the call, the difference between the 5*l.* paid on the share and the 3*l.* discount at which he had purchased and the stamp, and G. & B. settled with M.; G. & B. handed the certificates to the defendant, but retained the transfer. On the 3rd of May certain stockbrokers agreed to take in for the defendant 100 shares, and gave him a ticket with the name of John Baptist Issaverdens, of Smyrna. The defendant delivered a ticket to G. & B. with Issaverden's name and initials, and no address, which they returned as imperfect. On the 11th of May the company stopped payment, the transfer was never registered, and a call

of 5*l.* was made on the plaintiff as a contributory, which he paid, and sued the defendant to recover back the amount:—

Held (the Court having power to draw inferences of fact), first, that there was a contract between the plaintiff through G. & B. with the defendant, that when required the defendant would deliver a name into which the shares might be transferred; secondly, that as the name which the defendant had offered to G. & B. was that of a foreigner residing abroad, he did not offer a person to whom no reasonable objection could be made; and therefore the defendant had not fulfilled the contract, and was liable to the plaintiff for the amount of call and interest as damages for the breach.

THE action was brought to recover 500*l.*, the amount of a call of 5*l.* per share paid by the plaintiff upon 100 shares in the Imperial Mercantile Credit Association, Limited.

The cause came on for trial at the sittings in London after Trinity Term, 1868, when, by an order of nisi prius, a verdict was entered for the plaintiff subject to a special case, the Court to have power to draw inferences of fact and to amend the pleadings.

1. The defendant is a stockjobber, and a member of the London Stock Exchange.

2. In April, 1866, the plaintiff was the registered owner of 280 shares in the Imperial Mercantile Credit Association, Limited. Those shares were 50*l.* shares with 5*l.* paid up.

3. On the 18th of April, 1866, the plaintiff instructed Griffiths & Burton, stockbrokers, and members of the London Stock Exchange, to sell the shares on the Stock Exchange.

4. On the 20th of April, 1866, the shares were sold on the Stock Exchange by Griffiths & Burton to Norman Morris, a stockjobber and member of the Stock Exchange, for the next account day (the 27th of April). The terms of the sale were 50 shares at 2*l.* 7*s.* 6*d.* per share, and 230 shares at 2*l.* 5*s.* per share. The sale was a verbal one, as usual, and according to the usage of the London tock Exchange.

5. For the purpose of this case it is admitted that it is the custom on the Stock Exchange for the ultimate purchasing broker or jobber (there being usually many intermediate sales) to give to the selling broker or jobber, with whom he dealt on the name-day, which is the day before the settling day, a ticket or tickets containing the name or names of the person or persons to whom the shares are to be transferred. The person or persons whose name or names are thus passed are the last purchasers of the shares or

1870

ALLEN v. GRAVES.

purchasers of portions of them for the then account. The last purchasing jobber or broker puts such name or names upon the ticket which he hands to his seller, and so it is passed on from buyer to seller (should there be intermediate sales) till it reaches the first purchasing jobber or broker.

6. If the person or persons whose name or names are thus given cannot be reasonably objected to by the vendor, and if they by themselves or their agents accept the transfer of the shares (although they do not execute the same), the jobber, upon the price of the shares being paid to the selling broker, is relieved from all further liability. The vendor has ten days after the name has been given before he is bound to execute the transfer, during which period he may object to the name and bring his objection before the committee of the Stock Exchange. If the vendor requires a guarantee that the shares will be duly registered by the purchaser, that is a matter of special bargain between the vendor and the jobber to whom he sells. In this case it would have been Norman Morris. For this a consideration is paid.

7. The case then set out certain rules of the Stock Exchange, which are omitted as inapplicable, the transaction being out of the ordinary business of the Stock Exchange.

8. The defendant had agreed with Norman Morris on the 26th of April, 1866, that the defendant would take in for him until the next account day 100 shares in the said Imperial Mercantile Association, Limited, at the price of 3*l.* discount; the defendant receiving 1*s.* per share for so doing.

9. A member of the Stock Exchange is said to take in shares when he agrees with another to take shares from him or to deliver to him a name or names for shares for the then account, upon the terms that an equal number of shares are to be returned by the taker in, or name or names for them received by him on the following account day. The taker in either receives or pays something per share according to the state of the market.

Taking in is a mode by which jobbers and others dealing in shares mutually assist each other where a buyer of shares is not himself prepared to furnish a name on the name-day. The jobber's books would not shew whether the transaction was a sale or a taking in, the entries in both cases being the same in form.

A taker in of shares becomes the purchaser for that account with a concurrent obligation to deliver back a like number of shares on the ensuing account. The purchasing of the shares and the obligation to deliver back is one transaction. It differs from a mere purchase in this, that sometimes money is paid for taking in the shares and the reverse. "Taking in" is not the same as a "loan" of shares.

10. On the 26th of April, the name-day, Norman Morris passed a ticket to Griffiths & Burton as follows:—"150 to I. H. Robins, 25 to William Peglar, 5 to E. Kennedy," and another ticket for the 100 shares, the subject of this action, which ticket was delivered to him by the defendant.

The following is a copy of that ticket:—

"100 Imperials, "Consideration £

"Given Messrs. Griffiths & Burton, Stamps,

"26th April, 1866. "John Graves pays."

The meaning of the words "John Graves pays" is that he is to be applied to by the vendor's brokers for the purchase-money of the shares, and a name, but it does not necessarily imply that he is to be the transferree of the shares. If no name were given the shares would in the ordinary course be sold out against Morris.

11. On the same day it was arranged between Griffiths & Burton and the defendant that the delivery of the name by the defendant should stand over until required by Griffiths & Burton.

By one of the rules of the Stock Exchange on default by the purchaser in delivering a ticket containing the name and address of the buyer in full, the vendor may sell out the shares against the person with whom he contracted for their sale. In this case the person against whom the shares would have been sold out by the plaintiff, according to the said rule, was Norman Morris, and not the defendant. But the defendant would have been obliged to repay Norman Morris the amount he would have been compelled to pay in consequence of such selling out, or the defendant would have been held a defaulter on the Stock Exchange.

12. On the 27th, the plaintiff executed transfers for the 180 shares, which contained the names which had been given by Norman Morris, as mentioned in paragraph 10. He also executed a transfer of the 100 shares, but with a blank for the name of the transferree. The plaintiff did not observe the blank in the transfer.

1870

ALLEN v. GRAVES.

13. The transfers for the whole 280 shares were left by the plaintiff with Griffiths & Burton, and the transfers for the 180 mentioned above were delivered by them to the brokers of the transferrees.

14. A second call of 5*l.* per share had been made on the 26th of March, 1866, payable by two instalments on the 15th of May, 1866, and the 15th of June, 1866; they were paid on the 30th of April by Griffiths & Burton, the plaintiff's brokers, pursuant to a rule of the Stock Exchange.

15. Upon the same day the defendant gave Griffiths & Burton a cheque for 701*l.*, consisting of 200*l.*, the price at which he had agreed to take in the 100 shares for Norman Morris, 500*l.* for the call paid as above, and 1*l.* for the stamp on the transfer, and received from them either then or subsequently the certificates of the said shares, Griffiths & Burton retaining the transfer executed by the plaintiff in blank.

16. Griffiths & Burton settled in account with Norman Morris the difference in price payable to them over and above what the defendant paid them.

17. On the 3rd of May, 1866, Ionides & Barker, stockbrokers, and members of the Stock Exchange, agreed with the defendant to take in for him until the next account, viz., the 15th of May, 1866, 100 shares in the said association. The following is a copy of the ticket for the last-mentioned 100 shares, which was passed on the 3rd of May, 1866, by Ionides & Barker to the defendant:—

No. 27. If this ticket be divided, insert number and name of party dividing it, or the new ticket will not be paid for.

100 Imperials.

To John Baptist Issaverdens, of Smyrna.

Paid John Graves £500 5 0 3rd May, 1866.

Consideration £50
Stamps 5*s.*

£10 paid
5 dis. £500 0 0
5 0

Ionides & Barker pay £500 5 0

Given John Graves
3rd of May, 1866.

51, Threadneedle Street.

18. Upon the same day the defendant delivered to Ionides &

Barker the certificates of the 100 shares which he had received from Griffiths & Burton, and the defendant's clerk inserted in the transfer which had been delivered to him in blank by Griffiths & Burton, the name of the person mentioned in the above ticket, i.e., "John Baptist Issaverdens, of Smyrna," as transferree of the shares. Before the defendant's clerk filled up the said blank transfer, he had delivered at the office of Griffiths & Burton a ticket with "I. B. Issaverdens" upon it, without the first names in full, or the address of the said Issaverdens. Griffiths & Burton returned this ticket to the defendant as imperfect, and at the same time left with him the blank transfer which the defendant's clerk filled up as above-mentioned.

19. The transfer was in the usual form.

This transfer was never registered.

20. On the next account day (the 15th of May), defendant passed a name or names to Ionides & Barker for 100 other shares in the said association, and thus settled his previous transaction of taking in 100 shares with them.

21. Upon the 11th of May, 1866, the Imperial Mercantile Credit Association, Limited, stopped payment, and the company was eventually wound up by order in Chancery. A call of 5*l.* a share was subsequently duly made on the plaintiff in respect of the said shares, he having been placed on the list of contributories.

22. Upon the 19th of October the plaintiff paid the call upon the 100 shares.

23. The defendant has always refused to repay the plaintiff, and repudiates all liability.

25. The Court may draw inferences of fact in the same way as a jury, and have the same power of amendment as a judge at nisi prius.

26. The question for the opinion of the Court is whether, under the above circumstances, the plaintiff can recover from the defendant the sum paid by the plaintiff in respect of the last-mentioned call.

May 3. *J. Brown, Q.C.* (*Lanyon* with him), for the plaintiff.

Mellish, Q.C. (*Macnamara* and *Murphy* with him), for the defendant.

1870

ALLEN v. GRAVES.

The judgment of the Court having been given on the special facts of the case, it is unnecessary to state the arguments. In addition to the cases mentioned in the judgment, the following were cited:—*Hibblewhite* v. *M'Morine* (1), *Humble* v. *Langston* (2), *Swann* v. *North British Australasian Co.* (3), *Shepherd* v. *Murphy* (4), *Torrington* v. *Lowe* (5), *Goldschmidt* v. *Jones.* (6)

Cur. adv. vult.

May 31. The judgment of the Court (Blackburn, Mellor, and Hannen, JJ.) was delivered by

BLACKBURN, J. This was an action brought to recover 500*l.*, the amount of a call of 5*l.* per share on 100 shares in the Imperial Mercantile Credit Association, Limited, together with interest from the date of the call.

By an order of nisi prius, a verdict was taken subject to a special case to be stated; the Court to have power to draw inferences of fact, and to amend the pleadings.

We are, therefore, not embarrassed by the particular form of the pleadings, and have only to see whether the plaintiff on the facts is entitled to recover in an action at law against the defendant. The case arises on a contract made on the Stock Exchange, yet in the view we take of the facts it is not necessary to form or express any opinion on the points left yet unsettled by the cases of *Coles* v. *Bristow* (7), *Grissell* v. *Bristowe* (8), and discussed in the case of *Maxted* v. *Paine* (9) now pending in the Exchequer Chamber, so that we may deliver our judgment without waiting for the decision of the Court of Error in that case.

It appears from the statements in the case that the plaintiffs, through Griffiths & Burton, stockbrokers, entered into a contract with Morris, a stockjobber, for the sale from the plaintiff to Morris for the next account day (the 27th of April, 1866) of 280 shares in the Imperial Mercantile Credit Association, Limited. These shares were 250*l.* shares with 5*l.* paid up. A second call of 5*l.* per

(1) 6 M. & W. 200.
(2) 7 M. & W. 517.
(3) 7 H. & N. 603; 31 L. J. (Ex.) 425.
(4) 2 Ir. L. Rep. Eq. 544.
(5) Law Rep. 4 C. P. 26.
(6) 22 L. T. 220.
(7) Law Rep. 4 Ch. Ap. 3.
(8) Law Rep. 4 C. P. 36.
(9) Law Rep. 4 Ex. 81.

share had been made, but was not yet due. On the name-day Morris passed tickets for 180 of those shares supplied by various members of the Stock Exchange, giving the names of the purchasers; and as to those 180 shares no question now arises. But as to the other 100 shares Morris had, it appears, from the statements in the case contained in paragraphs 8 and 9, arranged with the defendant that he should "take in," as it is called, 100 shares at 3*l.* discount for Morris. The effect of that arrangement was to entitle Morris, on the name-day, to receive from the defendant a ticket containing the name and address of the persons into whose name it was proposed that the shares should be transferred; and as the shares with 5*l.* paid were taken by him at 3*l.* discount, the amount which the defendant would have to pay on the settling day to the holder of that ticket would be 200*l.*, and Morris was by his contract with Griffiths & Burton bound to furnish them with a ticket of the same kind, and if the defendant (Graves) had passed to Morris the ticket which Morris was entitled to demand from him, Morris might have passed that on to Griffiths & Burton, settling with them for the difference between the 200*l.* to be paid to Griffiths & Burton by the defendant, and the price they were entitled to receive from Morris. But no such ticket was passed by the defendant to Morris, nor by Morris to Griffiths & Burton.

Instead of that an informal memorandum was delivered by the defendant to Morris, and by Morris to Griffiths & Burton. It is set out in paragraph 10; and in the 11th paragraph it is stated that on the same day it was arranged between Griffiths & Burton and the defendant that the delivery of the name by the defendant should stand over until required by Griffiths & Burton.

The plaintiff on the settling day, the 27th of April, executed transfers for 280 shares, and transmitted them to his brokers along with the certificates for those shares. One of those transfers, which was for 100 shares, contained a blank for the name of the transferee; it is stated that the plaintiff did not, at the time he executed this transfer, observe the blank, but it is obvious his broker did so, and he knew of it before bringing this action.

On the 30th of April Griffiths & Burton, as the plaintiff's brokers, paid that call amounting to 500*l.*, and on the same day, as is stated in paragraph 15, the defendant paid to Griffiths &

1870

ALLEN v. GRAVES.

Burton the amount of the call, the 200*l.*, and the stamp on the transfer, and they settled with Morris. The defendant received the certificates, but the transfer remained in the hands of Griffiths & Burton. Thus everything was done exactly as if Graves, the defendant, had furnished on the name-day his own or some other unobjectionable name which the plaintiff and his brokers had accepted, and that name had been inserted in the transfer before its execution.

And the first point to be decided in this case is whether, on these facts, we can find that there is a contract between the plaintiff, through Griffiths & Burton, with the defendant. And we think there was one.

The transaction was altogether out of the ordinary course of business, and no customs of the Stock Exchange can be incorporated in such an unusual transaction. But it is clear that on the name-day, the 26th of April, Griffiths & Burton were in a position to have (on behalf of their client the plaintiff) demanded a regular ticket, and it is also clear that at the defendant's request they refrained from doing so. We need not determine whether this had the effect of exonerating Morris or not. Even if he still remains liable, the plaintiff's remedy by selling out on the 26th of April was lost, and the defendant gained time as between him and Morris. That was a consideration at once to the benefit of the defendant and to the prejudice of the plaintiff, and therefore was quite sufficient to support any promise, in fact, made on that consideration. See Comyn's Digest, Action upon the Case in Assumpsit, B.

The plaintiff, it is true, was probably not bound to adopt the act of his brokers in making this unusual contract, but he was at liberty to adopt and ratify it, and by bringing this action he has done so.

Then, what was the promise of the defendant, in fact? We think that when it was, in the language of the 11th paragraph, arranged that the delivery of the name by the defendant should stand over until required by Griffiths & Burton, the defendant promised that when required he would deliver a name into which the shares might be transferred.

It is not necessary to determine whether the legal effect of this

promise was that which the Exchequer Chamber put upon a somewhat similar transaction not on the Stock Exchange in *Walker* v. *Bartlett* (1), namely, "to cause the shares to be registered in his, the defendant's, name, or in that of some other person to be named by him as the owner thereof," or whether from the circumstances of its being a contract made with reference to a Stock Exchange transaction, and to some extent using the technical language of the Stock Exchange, it is to be understood as being only a promise to furnish the name of some person willing to accept the transfer and incur the liability against whom the plaintiff could make no objection, for in either case we think the contract was broken, and the damages would be the same.

It is necessary for the plaintiff to shew that he was ready and willing to perform his part of the contract, and we think he does shew this.

The certificates were delivered to the defendant, who, as is stated in the 15th paragraph, paid the price, so that all that remained to be done was to have the name supplied, the transfer executed and registered. The plaintiff executed a transfer in blank, which, when the name was inserted, would be inoperative as a deed unless re-executed by the transferror; it affords, however, very good evidence that the plaintiff was ready and willing to transfer those shares; nor can we doubt that if an unobjectionable name had been inserted in the transfer, and it had been brought to the plaintiff for re-execution, he would have delivered the deed, now perfect, afresh. This, however, was never done, and the defendant is driven to contend that what is described in the 17th and 18th paragraphs amounted to a fulfilment of his contract. Now, as already observed, after the price had been paid by the defendant, and the certificates had been handed over to him, the rest of the transaction was out of the usual course of the Stock Exchange, and none of the customs of that market can apply to it. We must look at the substance of what was done, and see if it really was a fulfilment of the defendant's obligation. And the name which the defendant then offered was that of a foreigner resident at Smyrna, who was therefore primâ facie a person to whom a very reasonable objection might be made; there is no

(1) 18 C. B. 845; 25 L. J. (C.P.) 263.

1870

ALLEN v. GRAVES.

statement in the case to shew that, notwithstanding this obvious objection, Issaverdens really was a person who was not objectionable, and we therefore draw the conclusion of fact that the defendant did not offer a person to whom no reasonable objection could be made. Neither do we think there is any evidence to shew that either the plaintiff or his brokers (supposing them to have authority to do so) agreed to waive all objections, and to accept the liability of Issaverdens in fulfilment of the defendant's contract. On the contrary, the ticket which was given to the brokers did not on the face of it disclose the objection, for it did not give the address of Issaverdens, and was on that account returned to the defendant. It is true that it is stated that at the same time the blank transfer was delivered to the defendant, which put it in the defendant's power to fill up the blank with any name he pleased, and it is stated that the defendant's clerk then inserted the name of Issaverdens, but we think it would be a great deal too much to assume from this that the brokers agreed to take without inquiry whatever name the defendant liked, even if the brokers could have bound the plaintiff by so unreasonable an agreement. We think the plaintiff is entitled to judgment for the sum of 500*l.* and interest.

Judgment for the plaintiff.

Attorneys for plaintiff: *Stibbard & Beck.*
Attorneys for defendant: *Druce, Sons, & Jackson.*

THE COMMISSIONERS FOR IMPROVING THE HARBOUR OF NEW SHOREHAM, APPELLANTS; THE OVERSEERS OF THE PARISH OF LANCING, RESPONDENTS.

1870
April 30.*

Poor-rate—Rateable Property—Piers of Harbour.

By 56 Geo. 3, c. lxxxi., certain commissioners were appointed for improving the harbour of New Shoreham. By s. 26 the property of all the wharves, quays, buildings, . . . and of all works erected in and about the harbour, in pursuance of the Acts, were vested in the commissioners. By s. 27 the commissioners were required to deepen, cleanse, scour, and enlarge the channel of the harbour, and to make new piers, with the necessary wharfing, to confine the channel opposite to and near the intended entrance into the harbour. By s. 83, after the piers and other works had been made, there was to be paid by every person, who should import or export any merchandise within the limits of the harbour, certain duties.

The commissioners enlarged the channel so as to make a new entrance in the harbour, and built new piers, as authorized, and received duties on all merchandise brought into the harbour:—

Held, that the soil in the channel was not vested by the statute in the commissioners, and they were not the occupiers so as to be rateable to the relief of the poor: that the soil on which the piers were built was vested in them, and that they were the occupiers of the piers, but their occupation was not sufficiently connected with earning the duties to make them rateable in respect of the piers.

CASE stated under 12 & 13 Vict. c. 45, s. 11.

The appellants are the commissioners for carrying into execution an Act of Parliament (56 Geo. 3, c. lxxxi.), intituled "An Act for the more effectual security and improvement of the Harbour of Shoreham, in the county of Sussex."

The respondents are the parish officers of Lancing, in the county of Sussex.

The respondents made a poor-rate for the parish of Lancing, dated the 10th of September, 1868, in which they charged the appellants as "occupiers and owners" of New Shoreham Harbour Works, tolls, and dues on a gross estimated rental of 4500*l.*, and a rateable value of 4000*l.*, and the sum of 100*l.* as a rate of 6*d.* in the pound.

By an Act of 33 Geo. 2, c. xxxv., passed in 1759, certain commissioners were appointed to make a new cut through the sea-beach, opposite the village called Kingston-by-Sea, about a mile to

* Decided in Easter Term.

1870

NEW SHOREHAM HARBOUR COMMISSIONERS v. LANCING.

the eastward of the town of New Shoreham, and to erect a pier or piers, and to do such other works as should be necessary in order to make and maintain a new and more commodious entrance into the harbour.

The various works authorized by the Act were made and executed by the commissioners, and by s. 2 the right and property of all and every the piers and all other works executed in pursuance of the Act, and the property in the ground whereon such piers and works were erected, as well as all such right and property as then belonged and appertained to the harbour of New Shoreham were thereby vested in the commissioners.

By an Act of 29 Geo. 3, c. xxi., passed in 1789, for the purpose of reducing the tolls authorized by the Act of 1759, it was, amongst other things, recited (as the fact was), that for the purposes of the Act of 1759, piers had been erected and a new cut made, but that from various causes the channel took a different direction, and then ran into the sea near half a mile to the eastward of the place where the piers were erected, and that the piers had been washed away, and no other works had since been erected, but that the harbour was then in as good a state as it had usually been for many years past.

The new channel referred to in the Act of 1789 as near half a mile to the eastward of the original cut authorized by the Act of 1759, afterwards from various causes became stopped up, and, in 1816, the channel or entrance to the harbour was about a mile to the east of the new entrance made under the authority of 56 Geo. 3, c. lxxxi.

By s. 26 of that Act the right and property of all the wharves, quays, and buildings, and of all timber, iron-work, wood, stone, and other materials then belonging to the commissioners—under the herein recited Acts or either of them, or to be purchased for any of the purposes of the present Act, and the property of all and every the works erected in and about the harbour in pursuance of such Acts, or of the present Act—are vested in the commissioners for the time being.

By s. 27 the limits of the harbour are defined as extending from Old Shoreham Bridge to the Wish, and 160 yards on the west side of the then intended (and since constructed) western pier, and 160 yards

on the east side of the then intended (and since constructed) eastern pier, and extending to the flow of the high water and spring-tides on the north and south sides of the harbour from the Wish to Old Shoreham Bridge (save and except the marshes or waste lands on either side of the harbour, between the west end of the town of New Shoreham and Old Shoreham Bridge); and by the same section the commissioners are authorized and required to deepen, cleanse, scour, and enlarge the channel of the harbour within the limits aforesaid, which they did, and to make a new pier or piers, with the necessary wharfing, to confine the channel opposite to and near the then intended (and since constructed) entrance into the harbour, which they were thereby required to open, and from time to time to amend and improve as they might see expedient, and also to make the necessary dams, sluices, platforms, and other works in the eastern division of the harbour, for the purpose of sluicing it, and also such works as should be found requisite to accelerate the closing up of the then entrance of the harbour, and likewise to construct a dredge boat for removing shoals within the limits aforesaid, and to construct lighthouses, storehouses, store-yards, and other buildings, and to make and effect such other works within the aforesaid limits as should be necessary for improving and preserving the navigation of the harbour and the use thereof by the persons trading thereto, and to effect various other works as in the section expressed.

The harbour, so far as the same is used for vessels of burden, is divided into two arms or branches; the western arm commences about half a mile south of Old Shoreham Bridge, and runs eastwardly to the new entrance referred to in s. 27, which is made between the eastern and western piers also referred to in the same section. The eastern arm, consisting of a canal and basin, extends eastwardly from the entrance to the Wish. The entrance is common to both arms of the harbour, and the entire harbour (except at the entrance) is separated from the sea by a bank of shingle, and is about two miles in length for vessels of burden, and its breadth varies from about 100 yards to 300 yards; the new entrance is about midway of the whole length of the harbour. The limits of the port of New Shoreham are much longer than the limits of the harbour, and extend to the parish of Rottingdean on the east, and the parish of

1870

NEW SHOREHAM HARBOUR COMMISSIONERS v. LANCING.

Herne on the west, and comprise a sea frontage of about sixteen miles.

By s. 55, and by other sections, the commissioners are authorized to purchase land for the purpose of improving the harbour, but these powers had never been exercised, nor any purchase of land or hereditaments made by the commissioners except a way in the parish of Kingston-by-Sea to the lighthouse, for the purchase of which 5*l.* was paid.

Section 83 enacts that, from and after the whole of the piers, dams, sluices, and other works thereby authorized to be made shall be made, there should be paid by every person who should lade or unlade, import or export any merchandize, &c., within the limits of the port of New Shoreham the several rates and duties set forth in Schedule B. to the Act; and s. 84 empowers the commissioners to fix reasonable rates upon the importation or exportation of any article not enumerated in the schedule.

Section 85 provides that, until all the works are completed, only one-fourth of the rates and duties shall be paid, subject to the provision made by s. 86; that as soon as the works are so far completed, that vessels of 200 tons may pass and repass in safety between the piers to be made in pursuance of the Act at high-water, then and thenceforth one-half of the rates and duties should be payable.

Section 89 provides that, in the event of the channel of the harbour falling into so bad a state that vessels of 200 tons registered admeasurement cannot any longer pass in safety between the piers into or out of the harbour, and so remain for a year, thenceforth only one-fourth of the rates authorized by the schedule shall be payable until such vessels can pass in safety at any time at high-water; but the commissioners have kept the channel of the harbour in such a state that vessels of 200 tons registered admeasurement could always pass in safety between the piers into or out of the harbour at high-water.

By s. 94, the master or other person having the command of any ship or other vessel coming within the port and harbour is made subject and liable to the payment of, and shall discharge, all rates and duties imposed by the Act on such ship or vessel, and on the several articles . . . or cargo therein contained, which may be

discharged or landed within the limits of the port and harbour, to the collector or collectors appointed by the commissioners; and the master is empowered to recover the same from the owner of the ship or proprietor of the cargo.

The commissioners, in pursuance of the powers contained in s. 27, formed a new entrance and made new piers, to confine the channel opposite to and near the entrance, and made the necessary dams and sluices in the eastern division of the harbour for the purpose of sluicing it, and have since formed a canal and basin there, now constituting the eastern arm, and they have constructed a lighthouse in the parish of Kingston-by-Sea, and are rated to the relief of the poor in that parish for it on an annual value of 8*l*. They have not erected any storehouses, storeyards, or other buildings; but they rent storehouses, yard, and workshops in the parish of Kingston-by-Sea, for which they are rated in that parish as occupiers, irrespective of the profits derived from the beforementioned rates and duties. The piers at the entrance of the harbour are to be taken as situate within the parish of Lancing, and form the entrance to the harbour, and afford facilities for entrance to vessels that make use of it.

The whole of the articles in respect whereof rates and duties are authorized to be levied (with an almost inappreciable exception) are landed within the limits of the harbour.

It is agreed that the sum of 4000*l*. shall be taken as the net annual revenue or profit derived from tolls received under the Act.

The collector of customs, under the authority of the Act, acts as the receiver and collector of all rates and dues for the commissioners. A very small portion of the rates and duties received is paid on board the vessels in the harbour; but, with that exception, all the rates and duties received are paid to the collector of customs at the customhouse, situate beyond the limits of the harbour, and in the parish of New Shoreham, by the masters of the ships or the owners of the cargoes or their agents.

It is also agreed that the eastern and western piers, and the spaces to the extent of 160 yards east of the eastern pier, and 160 yards west of the western pier respectively, shall be considered as situate within the parish of Lancing; and also that so much of

1870

NEW SHOREHAM HARBOUR COMMISSIONERS v. LANCING.

the harbour as lies on the south side of a line drawn down the centre thereof, from one extremity to the other (being about one-half the area of the harbour) shall be considered as situate in the parish of Lancing.

The question for the opinion of the Court was, whether the commissioners are rateable upon, or in respect of, the harbour piers and other works, or any or either of them, to be considered within the parish of Lancing, upon the amount of the net revenue or profits derived from the rates, duties, and dues, or any portion thereof, and if so, what portion.

Pollock, Q.C. (*Archibald,* and *F. Merrifield,* with him), for the appellants. The tolls per se are not rateable; to be rateable they must be connected with the occupation of land, so as to increase the value of the land: *Lewis* v. *Swansea.* (1) Neither are the commissioners rateable for the harbour. Section 26 does not vest any of the soil of the harbour in the commissioners; and s. 27 only empowers them to deepen and enlarge the channel, and make new piers. There is no power to purchase any land; the soil of the harbour does not belong to the commissioners; they have only an easement over it. They are, therefore, not rateable: *Rex* v. *Mersey and Irwell Navigation Co.* (2) Then, is the entrance to the harbour rateable? Sect. 26 vests in the commissioners the wharves, quays, buildings, and all works erected in the harbour in pursuance of the Act; but this is only for the purpose of maintaining an action or preferring an indictment. But, at all events, the soil in the entrance of the harbour is not vested in them. They have only an easement in the artificial channel, which is not rateable. *Rex* v. *Aire and Calder Navigation Co.* (3) is in point. If the entrance were to be rated, it would be an indirect mode of rating the harbour, and the courts will not permit an indirect rating of property: *Reg.* v. *Faversham Navigation Co.* (4) With regard to the piers, they are merely ancillary to the general works of the harbour. The land on which they stand can only be rated, so far as they are enhanced in value by the piers being built on it. But the piers do not help to earn the tolls; they are unproductive works, and no

(1) 5 E. & B. 508; 25 L. J. (M.C.) 33.
(2) 9 B. & C. 95.
(3) 9 B. & C. 820–5.
(4) 31 J. P. 822.

rent could be obtained for them. They stand on the same footing with regard to the harbour as a dam that keeps up water does to a canal, and it was held that the dam in such a case was not rateable: *Rex* v. *Aire and Calder Navigation Co.* (1) The soil on which the piers stand is not vested in the commissioners by s. 26; but, even if it were, although the commissioners are the occupiers of the piers, still the piers are not rateable on the authority of *Reg.* v. *North and South Shields Ferry Co.* (2) They are not sufficiently connected with the earning of the tolls to make them rateable.

Mellish, Q.C. (*Gates* with him), for the respondents. It is admitted that tolls per se are not rateable, and also that the whole area of the harbour is not rateable; but the channel and piers are artificial works without which vessels could not enter the harbour, and if it were not for those works no tolls could be earned; they, therefore, assist in earning the tolls, and are consequently rateable. By s. 26 the piers and works are vested in the commissioners; if piers are fixed to the soil, the authorities are clear that they are rateable to the extent of the tolls received. If the commissioners have such a possession of the piers as will enable them to maintain trespass, that is sufficient to make the piers rateable. A reference to s. 83 shews that the word "works" in s. 26 includes channel; this is evident, because the right to take tolls depends on the whole of the works being made; and it is absolutely necessary that the piers and channel should be made in order to form the entrance of the harbour. Sections 85, 86, and 89 shew that if there is only a partial maintenance of the channel, then only a portion of the tolls are to be received. If the channel is part of the works of the harbour it is vested in the commissioners, and if so, as it helps to earn the tolls, it is rateable. Then, do the piers help to earn the tolls? It is of the greatest importance to keeping open the channel that the piers should be erected and kept in repair. If the piers were not there, the channel would not exist, no ships could come into the harbour, and no tolls would be earned; and, further, if there were no piers the channel would partially fill in, and the commissioners would lose three-fourths of their tolls; how, then, can it be said that the piers do not help to earn the tolls? The commissioners are in occupation

(1) 3 B. & Ad. 139. (2) 1 E. & B. 140; 22 L. J. (M.C.) 9.

1870

NEW SHOREHAM HARBOUR COMMISSIONERS v. LANCING.

of the piers, and if they are in occupation, and derive profit from the occupation, which they clearly do, they are rateable.

Pollock, Q.C., replied.

BLACKBURN, J. The principle on which tolls can be rated is well established. The difficulty in this, as in many other cases, is to apply the principle.

The facts are these. The commissioners of Shoreham Harbour (it matters not whether they are public commissioners, or whether they are a trading company) have powers under their Act, amongst other things, though it is not very explicitly stated, to make an artificial entrance from the sea, through the shingle, into the old and natural harbour, and to dredge and improve the harbour, and the statute contains a provision that vessels going through this entrance, in order to enter the port of Shoreham, are to pay the commissioners tolls; and it is further provided (ss. 83, 85, and 86) that the tolls which the commissioners are entitled to levy are not to come to the full amount granted by the Act until the whole of the piers, dams, sluices, and other works are completed, and they are not to rise to one half of the amount until the works are so far completed as that vessels of 200 tons registered admeasurement can pass and repass in safety between the piers; and if at any time after the works are completed the entrance is again choked up, so that a vessel of 200 tons cannot get in, the rate of toll is to be diminished. So that the rate of toll that the commissioners are entitled to levy from each ship depends upon the extent to which the entrance is kept clear and open for the entrance of ships. It is also plain, from the fact of the entrance being made, and ships being enabled to come in, the number of ships entering the harbour would be greatly increased. I think it is stated in the case that, de facto, all vessels that come to Shoreham and go into the harbour must go through this entrance. The question, then, is, whether the amount of tolls thus received are in any way to be taken into account in estimating the rateable value of the property. It is very clear in law that tolls are not per se the subject of a rate. It is equally clear that, when parties occupy land, they are rateable for the value of that land, and that tolls, though not rateable, may be considered as enhancing the value of the occupation of the land,

whenever it appears that the occupation of the land is so connected with them that it can be said that the tolls and rates are levied on account of the occupation of the land; or, perhaps, though not levied on account of the occupation of the land, where they could not be received without an occupation of land. This, however, might be subject to some qualification.

The first question then is, are the commissioners the occupiers of the entrance into the harbour? Vessels cannot come into the harbour—and the commissioners practically will not get many dues unless they do come into the harbour—without passing through this entrance. Do the commissioners occupy that entrance in such a way as to make them rateable for the rates and dues? I think, looking at the whole of the statute, they do not. The power given by the Act is singularly worded. The commissioners are directed to make this new entrance. That is almost the only thing that the Act directs them to do. There is a general direction that, for the purpose of constructing the works necessary for improving and preserving the navigation of the harbour, the commissioners may dig, take up, and remove and carry away any rocks, stones, soil, sand, gravel, rubbish, or other gross matter, which shall hinder the navigation, doing as little damage as possible, and also making compensation for any damage they may do. Evidently those who framed the Act thought that the gravel dug out of this place, where the entrance was to be made, was worth nothing, and that the land was worth nothing. There is no express provision that they are to purchase the land for the purpose of making the entrance. I think, therefore, under s. 27, that although the commissioners are to make an excavation for the purpose of the navigation, they cannot be considered as purchasers of the land, and are not owners of it. The object of s. 26 is to vest the property mentioned in that section in the commissioners, in order to enable them to maintain legal proceedings against wrongdoers, and though that might be the object, it might also incidentally vest property in them for other purposes. But, I think, looking at the object of the section, it would be straining the words "the property of all the works erected about the harbour" contained in that section, to hold that those words vested the property in this piece of land, which constitutes the entrance

1870

NEW SHOREHAM HARBOUR COMMISSIONERS v. LANCING.

into the harbour, in the commissioners. They do not, therefore, occupy this piece of land, but they have merely a right to make an entrance into the harbour, which in itself would not be rateable. With regard to the other point, I think that the piers erected on each side of this entrance are works vested in the commissioners, and I think further, from the very nature of things, that so long as the commissioners occupy those piers they occupy the land on which the piers stand.

Then comes the question, which I take to be the question in the case, whether the occupation of the piers is so connected with the revenue derived from the tolls and dues that the occupation of the piers can be said to be enhanced by the receipt of the tolls and dues. If so, it would be a question for subsequent consideration in what proportion they are so enhanced. I think, however, that the profits which are derived from the tolls are too remote to enhance the value of the occupation of the piers. The argument for the respondent is this:—Without the entrance few or none of the tolls could be received; the entrance is essential to the receipt of the tolls. De facto it certainly is essential to enable the commissioners to levy the maximum tolls, and the entrance cannot de facto exist without the piers being kept up; if the piers fell into decay the entrance would probably be choked up, and the tolls would be lost; and, therefore, the possession and occupation of the piers is essential to earn the tolls, and consequently the occupation of them may be said to be enhanced by the value of the tolls received. There may be many instances in which things are of very great value for the preservation of valuable property elsewhere, but it cannot be said that the value of the occupation is enhanced because they preserve property elsewhere. Take the case of an extensive tract of rich fen land, which is subject at times to be inundated, and an embankment built for the purpose of keeping the water out. It is necessary in order to protect the land, that the embankment should be kept up, and the expense of doing that would be a charge on the land. But I think it would be a strong thing indeed to say that the parish, where the bank was situate and kept up at an expense and at a positive loss, were entitled to rate the embankment at a higher rate, because, without that bank the rich fen land inside it would be drowned. I think that would be too remote. Or take another

case, that of a house built on ground which derived support from the adjoining land (twenty years not having elapsed), if the owner of the adjoining land were to dig away the ground, the house would probably fall, and it would be worth while for the owner of the house to pay a sum of money to prevent his doing so. I think the parish in which the adjoining land was situate could not rate the occupier of that land for an occupation as enhanced by reason of the protection and support it gave to the house. I put these cases merely as shewing that it is not in every case in which everything is essential to the continuance of another thing in statu quo, and is of value and essential to making the profit, that it can be said that that profit is so attached to and so connected with the occupation of the land that it can fairly be classed as enhancing the value of the land. In the present case though these piers are in the occupation of the Shoreham Harbour Commissioners, and are kept up for the purpose of keeping the harbour in order, which, of course, affects the profits, still I do not think that the receipt of the tolls is so connected with the occupation of these piers as that it can fairly be said that the rate on it should be enhanced on account of that; and consequently I think, as I understand from the case that the piers are worth nothing unless the profits can be added, we should answer the question in favour of the commissioners, the appellants.

MELLOR, J. I am of the same opinion. The commissioners are empowered to deepen, cleanse, scour, and enlarge the channel of the harbour, and, amongst other works, to erect a pier or piers to confine the channel near to the intended entrance of the harbour. They did not by the statute acquire the actual property in the soil over which the entrance to the harbour was to be made, but it is possible they acquired a property in the soil on which the piers stand, so as to be rated at some reasonable sum for the piers. But even if that is the case it cannot be said that the land on which the piers stand is enhanced in value, or the piers, which must be assumed to be in the occupation of the commissioners, are enhanced by the tolls taken for vessels entering the harbour. My judgment rests on the same reasons that my Brother Blackburn has stated at length. It is therefore unnecessary for me to repeat them.

1870

NEW SHOREHAM HARBOUR COMMISSIONERS v. LANCING.

LUSH, J. I am of the same opinion. The rateable value of that which is the subject of occupation is by virtue of the Parochial Assessment Act (1) the rent at which the property might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent. The only property in the occupation of the company here are the piers. The tolls, it is agreed, are not of themselves a rateable subject. Then, the question is, what might those piers be expected to let for from year to year, deducting the average cost of maintaining them to command the rent? The cost of maintaining them is to be deducted from the annual value. What is the annual value of these piers? The occupier of the piers would get no part of the dues and no direct profit whatever from the harbour. The case is very analogous to that put by my Brother Blackburn as to an embankment. Perhaps one more closely analogous would be that of a valuable mine extending for a mile on the sea-shore, which mine itself was not a rateable subject, and supposing the owner of the mine was also the owner of a sea wall, and that the maintenance of that sea wall was necessary for the safety of the mine from inundation, could it be said that the rateability of that sea-wall could be with reference to the profits of the mine, because without the maintenance of the sea-wall the owner would not be able to work the mine at all? The commissioners are here in possession of tolls which it is agreed are not of themselves rateable. Then, it is said, the commissioners cannot earn the tolls unless they maintain these piers. So in the case I have put of the mine, and yet what connection is there between the sea-wall and the mine?

Judgment for the appellants.

Attorney for appellants: *W. Clarke.*
Attorney for respondents: *A. S. Edmunds.*

(1) 6 & 7 Wm. 4, c. 96, s. 1.

[IN THE EXCHEQUER CHAMBER.]

1870
June 21.

FRANCIS *v.* COCKRELL.

Negligence—Undertaking of Person receiving Money for a Place in a Building to view a Public Exhibition—Implied Undertaking that the Building is fit for the purpose.

A man, who causes a building to be erected for viewing a public exhibition and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose; and it is immaterial whether the money is to be appropriated to his own use or not.

The defendant, acting on behalf of himself and others interested in certain races, entered into a contract with E., who was a competent person to be so employed, to erect for them a grand stand for the purpose of viewing the races; and the defendant employed a person, who received 5*s.* (to be appropriated to the race fund) from every person admitted. The stand was negligently and improperly constructed (but not to the knowledge of the defendant), and, in consequence, fell and injured the plaintiff, who was one of the persons so admitted:—

Held, that the plaintiff could maintain an action against the defendant for the damage sustained, although the defendant was personally free from negligence, and had employed a competent person to erect the stand.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiff, on a special case. (1)

The case is fully set out in the report in the Court below.

June 20, 21. *H. Matthews, Q.C.* (with him *Macnamara*), for the defendant.

Mellish, Q.C. (with him *Harington*), for the plaintiff.

The arguments were the same as in the Court below.

In addition to the cases noticed in the judgments, or cited in the Court below, the following cases were cited:—*Lynch* v. *Nurdin* (2); *Illidge* v. *Goodwin* (3); *Smith* v. *Marrable* (4); *Chapman* v. *Rothwell* (5); *Blake* v. *Thirst* (6); *Longmeid* v. *Holliday* (7); *Winterbottom* v. *Wright.* (8)

(1) Ante, p. 184.
(2) 1 Q. B. 29.
(3) 5 C. & P. 190.
(4) 11 M. & W. 5.
(5) E. B. & E. 168; 27 L. J. (Q.B.) 315.
(6) 2 H. & C. 20; 32 L. J. (Ex.) 188.
(7) 6 Ex. 761; 20 L. J. (Ex.) 430.
(8) 10 M. & W. 109.

1870

FRANCIS v. COCKRELL.

KELLY, C.B. We are all of opinion that the judgment should be affirmed. Two questions have been raised. First, whether there was any contract at all between the plaintiff and the defendant. Secondly, if there was a contract, for what did the defendant contract in consideration of receiving 5*s.*, which was paid by the plaintiff for a seat upon this stand?

Upon the first question, whether there was any contract at all between these parties, I own that I have not been able to bring myself to entertain the shadow of a doubt from the commencement of the argument. The defendant is one of several persons who, taking an interest in a steeplechase which was about to be run, associated themselves together for the purpose of making preparations for the race, and, as it was quite obvious that all could not conveniently act together in everything that was to be done, whether it was for the steeplechase, or for the accommodation of the public, they had delegated one duty to one person, and another duty to another. The defendant had delegated to him, and undertook, the task of causing a stand to be erected upon a piece of ground which they had possessed themselves of, and from which a good view of the steeplechase might be obtained. The defendant and the others employed Messrs. Eassie to erect the stand; and the stand being erected, they also employed a person to stand at the door to admit any one of the public who presented himself to the ground and to a seat upon the stand on the payment of 5*s.* That there was a contract between these persons (the defendant being one) and those of the public from whom their servant received the 5*s.* admission appears to me to be beyond contradiction. There was, certainly, no express contract, nor does it appear that the plaintiff and the defendant ever actually set eyes upon each other, but it is certain that the defendant, being one of these managers of the steeplechase, having caused to be erected this stand, and having possessed himself of the stand and of the piece of ground upon which the stand was erected, instructed and authorized the person at the door to grant admission to any one who should present himself to that ground and to this stand, with an implied promise that he should have a seat upon the stand during the steeplechase, and the plaintiff having presented himself and paid the 5*s.*, the implied contract arose between the defendant and the plaintiff.

I ought to observe, before I pass from the first question upon the contract, that it was urged, as this stand was not erected nor this money received for the benefit of the defendant and of the other persons who were interested in this steeplechase, that, therefore, it was different from the case of a man letting a seat upon a stand for his own personal gain and profit. I see no difference, and I hold it to be perfectly immaterial to what purpose the money was to be applied, whether it was to be received for the benefit of the receiver, or merely to enable him to make the steeplechase a matter of greater interest to the public or for the purpose of extending the amusement and enjoyment of the public. Whatever might have been the purpose is immaterial. It is sufficient that the defendant, having possessed himself of this stand, from which a good view of the steeplechase might be obtained, promised to the plaintiff that he should have a seat upon that stand during the steeplechase in consideration of the sum of 5*s*., which he paid, and which the defendant received.

But then the second and more important question arises, what was the implied contract, with respect to the sufficiency of the stand for the purpose to which it was to be applied? I do not hesitate to say that I am clearly of opinion, as a general proposition of law, that when one man engages with another to supply him with a particular article or thing, to be applied to a certain use and purpose, in consideration of a pecuniary payment, he enters into an implied contract that the article or thing shall be reasonably fit for the purpose for which it is to be used and to which it is to be applied. That I hold to be a general proposition of law applicable to all contracts of this nature and character. It is, indeed, subject to a qualification or exception, to which I will hereafter advert, as determined by the case of *Redhead* v. *Midland Ry. Co.* (1); but that qualification extends only to the case of some defect which is unseen and unknown and undiscoverable, not only unknown to the contracting party, but undiscoverable by the exercise of any reasonable skill and diligence, or by any ordinary and reasonable means of inquiry and examination.

Let us see how the case stands upon the authorities. It was insisted that there was no such warranty,—that there was no such

(1) Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.

1870

FRANCIS v. COCKRELL.

contract. When we look to the judgment delivered in this case in the Court of Queen's Bench (1), it appears to have proceeded upon this principle, though the principle is laid down in somewhat different terms from those in which I have expressed it. It appears that the ground of the decision in the Court below was, that the defendant had contracted against any defect in the construction of the stand, occasioned by reason of his own negligence or of the negligence of the persons who had erected the stand. Though entirely adopting that as the ground of the decision in the Court of Queen's Bench, I should rather express myself differently and say, that what the defendant in a case like this contracted for was, that the stand upon which he supplied a seat to the plaintiff for the pecuniary consideration of 5*s*., should be reasonably fit for the purpose for which it was supplied to him, without any other exception or qualification than that which was held to apply to such a contract in the case of *Redhead* v. *Midland Ry. Co.* (2), that is, that the defendant did not contract against any unseen and unknown defect which there was no means of discovering or ascertaining under ordinary and reasonable modes of inquiry or examination.

Now that there is an implied contract that an article supplied for hire and reward, or for a pecuniary consideration, shall be reasonably fit for the purpose for which it is to be supplied was, if not decided, assumed and affirmed as established law by the case of *Redhead* v. *Midland Ry. Co.* (2), both in the Court of Queen's Bench and in the Court of Exchequer Chamber. But the authority does not rest there. Whether it be the case of a carriage or of a bridge, or as in the present case of a stand in which seats are contracted for to witness some public spectacle, the rule of law and the rule of reason and good sense appear to me to be the same. Take the more ordinary case of a carriage. If a man engaged in consideration of, say, a guinea, to supply a carriage such as an omnibus, to hold six persons, to proceed on an excursion to the Crystal Palace, and a guinea is paid, and the carriage is sent, is it possible to conceive that he does not contract, not only that that carriage shall contain seats for six persons, but that it shall be reasonably fit for the purpose?

(1) Ante, p. 191. (2) Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.

1870

FRANCIS v. COCKRELL.

I cannot understand upon what imaginable ground it is to be supposed that there is not such an implied undertaking in every contract of this description. Let us see whether the authorities (they are not many in number), do not go the whole length of the proposition to which I am now adverting. Take the case of *Grote* v. *Chester and Holyhead Ry. Co.* (1), that was not the case of a carriage, where, perhaps, the law may be more clear, and the justice and reason of the case more entirely beyond contradiction or controversy; that was a case in which a railway company had not constructed the bridge themselves, though the language of some part of the case seems to point to some such state of facts, but they had contracted with an engineer, just as in this case the defendant had contracted with Messrs. Eassie, to erect a bridge upon their railway, over which all who had occasion to travel to a particular station had to pass; from some defect in the construction of the bridge, which might have been avoided by the exercise of ordinary care and skill, the bridge broke down, and some injury was sustained by the plaintiff who had occasion to pass over the bridge. The question was whether the defendants, who had caused that bridge to be constructed by an engineer with whom they had entered into a contract, had not entered into an implied contract with everybody who had occasion lawfully to make use of the bridge and pass over that bridge, that it was reasonably fit for the purpose for which it was to be applied, that is, that it was safe and secure against ordinary risks and dangers for any one to pass over it. It was held that the defendants had entered into such an implied contract, and they were held liable for the consequences of the defect. There it appeared, and that is really what makes that case in principle a direct authority for the decision which we are now pronouncing, that the railway company had not actually themselves constructed this bridge; but they had contracted with an engineer to build the bridge, and the engineer in building or constructing the bridge had failed to exercise that amount of care and skill which was necessary to fit it for the purpose for which it was to be applied,—to make it reasonably safe for the use of the public; and the railway company, who had entered into that contract with him, and by

(1) 2 Ex. 251.

1870

FRANCIS v. COCKRELL.

2 E. & D. 338

means of that contract had caused the bridge to be constructed, were held liable for the consequences of a defect not occasioned by their own negligence, not at all within their knowledge, but which arose from the negligence or want of care and skill on the part of those with whom they had contracted to construct the bridge. Under those circumstances there is really no difference in principle between that case and this, unless there be a distinction between the case of a bridge over which some of the public have to pass and this stand upon the racecourse, which was to be used by any one who paid 5*s.* for a seat and was desirous of witnessing the steeplechase.

The case of *The Polytechnic Institution* was also cited. That brings me to an argument which has been much relied upon and brought to the attention of the Court by Mr. Matthews, that this is analogous to the case of the hiring of a house or other premises, that is, to the contract between lessor and lessee of a house or premises, upon which he says, and says truly, there is no implied undertaking by the lessor that it shall be reasonably fit, or fit at all for the purposes for which it is let, that is, for the purpose of habitation. There is really no analogy at all between the case of a lessor and lessee of a house, and the case of one who contracts for the supply of a carriage or for the supply of a seat in a stand upon a race-course, or for the safe passage over a railway bridge. In the case of a lessor and lessee of a house, both parties, before the lease is granted and accepted, ascertain for themselves the condition of the premises, and they then enter into such express covenants as they may think fit, for the repair of the premises, or for any other purpose incidental to the enjoyment of the premises; but not only is there no implied covenant that the house shall be fit for the purpose for which it is to be applied, but in many cases there are express covenants which would plainly by implication exclude any such covenant at all. Therefore the supposed analogy, between the case of the hiring or letting of a house and the supply of an article, whether a seat upon a race-stand or a bridge, or anything of that description, is wholly inapplicable.

As to the case of *The Polytechnic Institution*, I think it has escaped the attention of Mr. Matthews that in the case most relied

upon (*Pike* v. *Polytechnic Institution* (1)) the defect which really led to the accident was a defect in the construction of the staircase which had existed some length of time before the defendants had taken and entered upon the occupation of the premises, and which was unknown to them; and upon that Erle, C.J., delivered the opinion which, I think, was perfectly sound in law, that the defendants were not liable. It is true that, in the first case, that of *Brazier* v. *Polytechnic Institution* (2), where there was a verdict for the plaintiff, the defendants were held responsible for the insufficiency of the staircase; but that was by reason of their own negligence in certain alterations which they had effected to the staircase. So in the other case arising from the same accident (*Pike* v. *Polytechnic Institution* (3)), it was held, in an action against the defendants, as owners and possessed of a place of public exhibition, for not properly constructing and maintaining it, whereby the staircase fell, and the plaintiff, a visitor, was injured, that the defendants were not responsible for latent defects in the staircase, whether in construction or in material, existing at the time they took the building, but were responsible for any want of due care to keep it in a reasonably safe condition, and were liable for the repairs done in an improper manner tending to weaken its strength. Now, that really lays down the true distinction upon the subject, and that was the foundation of the decision in *Redhead* v. *Midland Ry. Co.* (4), because the defendants in these cases were held responsible for negligence in the execution of any work which they had had executed themselves to the staircase from which the injury arose to the plaintiff; but it was held, in strict conformity with the principle and the qualification laid down in *Redhead* v. *Midland Ry. Co.* (4), that the defendants were not responsible for a defect which existed at the time when they took the premises, and which, therefore, was not occasioned by any negligence of theirs, or of any one on whose behalf they had contracted, either expressly or by implication, but which was unknown to them, and undiscoverable by the exercise of any ordinary care or skill. The true distinction, therefore, which per-

(1) 1 F. & F. 712, 715.
(2) 1 F. & F. 507.
(3) 1 F. & F. 712.
(4) Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.

1870

FRANCIS v. COCKRELL.

vades the whole of the cases is this: First, there is the principle which I hold to be well established by all the authorities, that one who lets for hire, or engages for the supply of any article or thing, whether it be a carriage to be ridden in, or a bridge to be passed over, or a stand from which to view a steeplechase, or a place to be sat in by anybody who is to witness a spectacle, for a pecuniary consideration, does warrant, and does impliedly contract, that the article or thing is reasonably fit for the purpose to which it is to be applied; but, secondly, he does not contract against any unseen and unknown defect which cannot be discovered, or which may be said to be undiscoverable by any ordinary or reasonable means of inquiry and examination.

The only remaining point which was made is, that this defect in this stand was occasioned by the want of skill and care of Messrs. Eassie, by whom the stand was erected. But in conformity with the principle laid down in these cases to which I have adverted, and, above all, to the distinction taken in this very case of the accident at the Polytechnic Institution, upon which Mr. Matthews has chiefly relied, the defendant is liable for anything that he must be supposed to have contracted for; and he contracted for the sufficiency of this stand, which was in his own possession and control, and which, as in the case of the railway bridge in *Grote* v. *Chester and Holyhead Ry. Co.* (1), though not erected and constructed by himself, was erected and constructed under his direction and for his benefit by a contractor he had employed. The liability extends, not only to a stand erected by the defendant himself, the person who enters into a contract of this nature, but to a stand erected by another who had contracted for the erection of it with the defendant.

I am, therefore, of opinion that there was a contract between the plaintiff and the defendant—an implied contract indeed, but yet a binding contract—and that that contract did, in effect, extend to this, that the stand, upon which the defendant had engaged that the plaintiff should enjoy a seat in consideration of 5*s.* during the steeplechase, was reasonably fit for the purpose for which it was to be used, and for which the seat was contracted to be supplied to the plaintiff. It was not so fit, and the defect was no unseen and

(1) 2 Ex. 251.

unknown and undiscoverable defect, but it was a defect occasioned by the negligence and want of care and skill of those with whom the defendant had contracted for the erection of the stand.

Under these circumstances, I am of opinion that the judgment of the Court of Queen's Bench was right and must be affirmed.

MARTIN. B. I am also of opinion that the judgment of the Court of Queen's Bench was right, and ought to be affirmed. The case, as regards the plaintiff, was this, that he went to the Cheltenham racecourse, and there found erected a temporary stand which had been put up, under a contract by some persons, for the price of 66*l.* 10*s.* It was, I presume, composed of rough timber, put together in order to enable persons to stand at a higher level than the racecourse, and, therefore, to see the race more conveniently. A man was also placed there by the defendant who was to allow no person to enter that stand without paying 5*s.* The defendant acted, in point of fact, as part proprietor of the stand, and acted as receiver of the money. It does not appear that he actually received the money from the plaintiff, but it seems to me that he was exactly in the same position as if he had received it with his own hands. The plaintiff thereupon entered upon this stand, and while he was there it gave way and fell. It was, in fact, negligently and improperly constructed; and was insufficient for the purpose; and, for that reason alone, it fell, and the plaintiff sustained this injury without any default of his own.

There are two questions in the case; and the first is, what would be the legal rights of the plaintiff if this stand had been erected by a private person for his own sole gain? I do not at all pretend to say whether the relation of the parties raised a contract or a duty. It seems to me exactly the same thing; but I am of opinion that when a man has erected a stand of this kind for profit, that he contracts impliedly with each individual who enters there, and pays money to him for the entrance to it, that it is reasonably fit and proper for the purpose; or, if you choose to put it in another form, that it is the duty of a person, who so holds out a building of this sort, to have it in a fit and proper state for the safe reception of the persons who are admitted. I apprehend it might have been described, at a time

1870

FRANCIS v. COCKERELL.

when pleading was more strict than it is now, either as a contract or as a duty, and that it is one of those implied contracts which, in point of fact, is the same as a duty. I do not at all distinguish between them, and, therefore, in my judgment, the duty was personal on the defendant, when he received this money, to provide that the stand was fit and proper—ordinarily fit and proper for the purpose. Not that I consider the defendant in any way an insurer, and responsible for anything beyond what a man would reasonably be responsible for; but I think that he was responsible for that stand being in a fit and proper condition,—in a reasonably fit and proper condition for the purpose for which he took the money and admitted the person; and, therefore, I am very clearly of opinion that, supposing the defendant to have been a person who had fitted up this stand for his own private benefit, he would be responsible on that contract.

But the defendant relies upon the fact that Messrs. Eassie, the contractors, built the stand. The facts were, that a short time before the race, Messrs. Eassie were employed by the defendant and others for the purpose of erecting this stand, and the case finds that Messrs. Eassie were very competent and proper persons to be employed for the purpose of erecting a sufficient and proper stand; and it was contended by Mr. Matthews that the plaintiff would have had a right of action against Messrs. Eassie. In my opinion he would not. Suppose Messrs. Eassie had built this stand according to an order given by the defendant, to erect this stand in a manner pointed out, and they had strictly fulfilled their undertaking, and erected it according to the order, could any person contend that there would be any liability to the plaintiff on the part of Messrs. Eassie for any defect in the stand? How can it be asserted that a third person, who afterwards entered into a contract with the defendant who had admitted him, would have any action against Messrs. Eassie in respect of what they contracted to do? I consider that Messrs. Eassie stood in too remote a position from the plaintiff to be liable to an action by him. The law of England looks at proximate liabilities as far as is possible, and endeavours to confine liabilities to the persons immediately concerned; and I apprehend it would be impossible to contend that a person, who had erected a building of this kind strictly according to his con-

tract, would be responsible to a stranger who happened to go upon it, if it is found not to be fit for its purpose.

I am not aware of any case to show, that, where a man has entered into a direct bargain with another by taking 5*s.* to admit him upon the stand, that the latter, in the event of any misfortune coming to him by reason of the insufficiency of the stand, is to be thrown over upon some person who had made the contract to build the stand. I am, therefore, clearly of opinion, that after Messrs. Eassie had erected this stand and the defendant had, through the man he had placed there, taken the 5*s.* from the plaintiff for permitting him to go upon the stand for the purpose of viewing the race, the defendant impliedly contracted that the stand was reasonably fit and proper for the purpose; or that the defendant had a duty imposed upon him to have a stand reasonably fit for that purpose, that is, for the reception of the plaintiff. I think the plaintiff is clearly entitled to recover from the defendant in the supposed case, either in case or contract.

The only question remaining is, is the defendant, under the peculiar circumstances, responsible? The defendant was not steward of these races; but he had taken part in the management; he had received the money, or it had been paid to his credit at the bank. I dare say the defendant would have found it very difficult to have pleaded a plea in abatement. He was a contracting party, or a party upon whom this duty was cast with regard to the plaintiff, and, therefore, I think that this point also fails, and that the judgment of the Court of Queen's Bench is right and ought to be affirmed.

CHANNELL, B. I have not been free from doubt in the course of the argument; but having carefully considered the judgment of the Court of Queen's Bench and the argument which Mr. Matthews has addressed to us, I am of opinion that the judgment should be affirmed. Supposing the defendant had built the stand, or ordered it to be built, for his own profit, receiving for his own use the price for admission, I cannot think the case would admit of any reasonable doubt. But that is not precisely this case. The defendant was a party to the contract under which the stand was built, in this way: he had associated himself with other persons who were desirous of

1870

FRANCIS v. COCKRELL.

providing a place for the accommodation of the public to see these races. A tender was made on the part of Messrs. Eassie, and the defendant was present at the meeting at which the tender was accepted, and in that sense, in my judgment, he contracted with Messrs. Eassie for the erection of this stand although he contracted along with others. The building turns out in the result not to have been properly constructed; it does not appear to have been surveyed by the defendant himself; but he was, with the others, in my judgment, possessed of that building, and being so possessed of that building he receives the sum of 5*s.* for admission to it; and I think that nothing turns upon the fact that his was not the hand to receive the 5*s.* from the plaintiff. It has been admitted, properly enough, by Mr. Matthews, that the receipt of the person whom he appointed to stand there must be considered to be the receipt of his servant or of some person on whose receipt he was responsible. Then, being possessed of the building, he may be taken to have received the 5*s.* as the price for the admission. No doubt he received it together with other persons. It was not intended to be a receipt for his benefit, nor was it. The money was all handed over to the Race Committee; or rather to the banker whom they had appointed, and it stood to their credit in their names. The defendant, therefore, did not receive the money alone, but he must be taken to have received it, and the fact that he got no individual and direct benefit for himself does not, according to the recent class of cases, in my opinion, prevent his liability.

I would add, that I think this case, if not governed, is materially assisted and elucidated by the case of *Grote* v. *Chester and Holyhead Ry. Co.* (1); by the case of *Sharp* v. *Grey* (2); and particularly by the case of *Burns* v. *Cork and Bandon Ry. Co.* (3)

I am of opinion, therefore, that the judgment of the Court of Queen's Bench should be affirmed.

KEATING, J. I also am of opinion that the judgment of the Court of Queen's Bench should be affirmed. It seems to me, for the reasons which have been given already by the Court and which I will not repeat, that the defendant by the receipt of 5*s.*

(1) 2 Ex. 251. (2) 9 Bing. 457. (3) 13 Ir. C. L. Rep. 543.

did contract with the plaintiff that the stand was reasonably fit for the purpose for which it was held out to the public, that is, to afford a secure footing in order to see the steeplechase. I should prefer, however, to state the defendant's liability or his undertaking to be, that due care, that is reasonable care, had been exercised in the erection of that stand which he so let out for the use of the public. It is found upon the case that reasonable care was not exercised, but that negligence occurred in its erection, for which, it appears to me, the defendant is liable; and therefore, I think, the judgment of the Court of Queen's Bench ought to be affirmed.

MONTAGUE SMITH, J. I am of the same opinion. It is unnecessary to go through the facts of the case. It seems to me that upon the evidence there was a contract by the defendant, which gave to the plaintiff for the sum of 5s. which he paid a licence to enter upon and use the stand; and the question then arises, whether there is any implied undertaking at all given by the defendant as to the secure state of the stand. I think, in conformity with the decision in *Redhead* v. *Midland Ry. Co.* (1), that there was no warranty or insurance that the stand was absolutely safe; but, I think, that there was an implied undertaking on the part of the defendant that due care had been used in the construction of it. It seems to me that, in cases of this kind which relate to things and not to personal services, the undertaking or promise to use due care may be more correctly stated in an impersonal than a personal form, and the proper mode of stating it is, the defendant promised that due care and skill had been used in the construction of the building; or the obligation may be put in the other form, that the building was reasonably fit for the use for which it was let, so far as the exercise of reasonable care and skill could make it so. It seems to me that those are obligations which are to be implied from a contract of this kind, and that in this case they have been broken; for, although it is not found that there was any personal negligence on the part of the defendant, yet it is found that there was negligence on the part of those who constructed the stand, and who were employed by the defendant to erect it. For that negli-

(1) Law Rep. 2 Q. B. 412; Law Rep. 4 Q. B. 379.

1870

FRANCIS v. COCKRELL.

gence it seems to me that the defendant is responsible; and consequently, I think, with the rest of the Court, that the judgment of the Court of Queen's Bench is right and must be affirmed.

CLEASBY, B. I also think that the plaintiff is entitled to our judgment. It appears that a resolution was come to, to which the defendant was a party, that a stand should be erected for the use of the public at these races. He agrees to that; but neither he nor any one present was a builder; therefore somebody must be employed to build it. Still the persons who provide this stand for the use of the public are the defendant and the other persons who came to that resolution. The defendant takes, moreover, an active part in the matter, for it was agreed that he should be the person who should employ the builder to do the work; and that being so, the defendant being a party to providing a stand for the use of the public, it appears to me that he was certainly under some duty in connection with that stand so provided by him; and the question is, whether that duty is only a duty of a personal nature, that is to say, only so far as regards his own personal interference in the matter, that he shall use due and reasonable care himself, or whether it was a duty annexed to the thing itself, a duty in connection with the way in which the thing itself should be erected. The public or those coming to use this place, have no idea of contracting with any particular person, or of any personal obligation in anybody. What they rely upon is the thing itself. They rely upon the security of the thing itself; and I think that the duty on the part of those who provide the building is co-extensive with that, and the duty of the defendant was to take care that the stand should be erected so as to be reasonably fit and proper for the purpose.

Now, it appears that the stand was not erected so as to be reasonably fit and proper for the purpose; and, although, of course, until somebody comes to make use of this building, no obligation can arise which can be enforced, yet as soon as any person does come to make use of the building, then, like the other cases where the public do not contemplate any particular person, the duty which has been imposed upon the defendant makes a right in the person who has connected himself with the matter, and that right and

breach of duty give rise to a cause of action in the person who has suffered by the breach of duty. That is the construction I am disposed to put upon the relation of the plaintiff and defendant in this case. The liability would not apply to latent defects, because the defendant is only to take care that it is properly erected so as to be reasonably fit and proper. Here the erection was negligently done. I do not think that there is anything in the authorities at variance with that.

The point that Mr. Matthews referred to last was raised in the case of *George* v. *Skivington* (1), where there was an injury to one person, the wife, and a contract of sale with another person, the husband. The wife was considered to have a good cause of action, and I would adopt the view which the Lord Chief Baron took in that case. He said there was a duty in the vendor to use ordinary care in compounding the article sold, and that this extended to the person for whose use he knew it was purchased, and this duty having been violated, and he, having failed to use reasonable care, was liable in an action at the suit of the third person. The case that has been referred to more than once already, of *Grote* v. *Chester and Holyhead Ry. Co.* (2), is entirely founded upon that principle. There the plaintiff had entered into a contract with another company to be carried—not to be carried by the defendants at all. The defendants had constructed the bridge along which the other company were compelled to travel. There was a plain duty in the defendants, who had to provide a bridge for the public, to take care that it was constructed of proper materials and in a proper manner, and upon a breach of that duty the plaintiff recovered. What the Court decided was, that the fact that a proper engineer had been employed did not absolve the defendants, because their duty was to take care that the bridge was not constructed in an inefficient manner. If it had been so constructed, the breach of duty arose, and the plaintiff would come within the reach or area of the duty, because he was lawfully travelling over the bridge. It was held that the plaintiff was entitled to take advantage of that duty on the part of the defendants, and had a good cause of action; and I think the proper ground of decision in this case is, that the duty here is not of a personal nature merely, as regards

(1) Law Rep. 5 Ex. 1. (2) 2 Ex. 251.

1870

FRANCIS v. COCKRELL.

the man himself, that he will take due and reasonable care (for the defendant did take due and reasonable care in employing a respectable and proper builder); it is not personal in that way, nor do I think that there was any personal contract in this sense between the defendant and the plaintiff; nor do I put my decision so entirely upon the ground of contract between them; I might lean in that direction, but I do not put my decision upon that ground. I think the plaintiff relied upon the thing itself being in a proper state; and as the fault or breach of duty of the defendant was that it was not in that state, the plaintiff is entitled to recover in this action.

Judgment affirmed.

Attorneys for plaintiff: *Tamplin & Tayler.*
Attorney for defendant: *Bromley.*

June 23.

[IN THE EXCHEQUER CHAMBER.]

IRELAND AND OTHERS *v.* LIVINGSTON.

Order by Merchant to Commission Agent Abroad for Purchase of Goods, Construction of—Custom or Course of Business—Principal and Agent—Vendor and Vendee.

The defendant, a merchant in Liverpool, in July wrote to the plaintiffs, commission agents in Mauritius:—"My opinion is that, should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a maximum, say, 26*s.* 9*d.* (for Nos. 10 to 12), and you may ship me 500 tons, to cover cost freight and insurance. Fifty tons more or less, of no moment, if it enables you to get a suitable vessel. . . I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but, if that is not compassable, you may ship to either Liverpool or London." The defendant also afterwards sent a telegram, which was received by the plaintiffs with the letter on the 24th of August:—"If possible, the ship to call for orders for a good port in the United Kingdom." The plaintiffs wrote in reply, "We note that you authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 to 12, at a cost not exceeding 26*s.* 9*d.* per ton on board, including freight and insurance, and your remarks regarding the destination of the vessel have also our attention."

When a commission agent at the Mauritius receives instructions from England to purchase so large a quantity as 500 tons of sugar of a specified quality within a prescribed limit, it is generally impossible for him to purchase the whole at one time, or at one price, or from one seller, and it is generally necessary for him to

purchase it at different times and in different lots or parcels. The plaintiffs so purchased about 400 tons, and shipped them to the defendant about the end of September, being then unable to get any more within the defendant's limit; in the meantime, prices having gone down in England, the defendant wrote a countermand of his order, which the plaintiffs received on the 20th of October. On the arrival of the 400 tons in England, the defendant refused to accept them on the ground that his order had not been complied with :—

Held (reversing the judgment of the Court of Queen's Bench), by Kelly, C.B., Martin, and Channell, BB., and Keating, J. (Montague Smith, J. and Cleasby, B., dissenting); that the order contained in the defendant's letter was for a single cargo of 500 tons in a single ship, and that, the order being unambiguous, the custom or course of business at the Mauritius could not affect the construction to be put upon it; and that the defendant's purchase and shipment of 400 tons were not in compliance with the order.

Rev'd 2 R. 5 H. L. 395.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiffs, upon demurrers and on a special case.

Declaration that the plaintiffs were merchants and commission agents at Mauritius, and the defendant was a merchant carrying on business in Liverpool, and the defendant employed the plaintiffs to purchase at Mauritius, for and on account of the defendant and to ship the same at Mauritius, a large quantity of cane sugar at about a certain limit given by the defendant to the plaintiffs as the maximum, to wit 26*s.* 9*d.*, for Nos. 10 to 12, to cover cost freight and insurance; the plaintiffs to provide insurance and draw upon the defendant for cost of the said purchase and shipment as customary, attaching documents, and the defendant then promised the plaintiffs that in consideration of the premises he would accept the said sugar, and would give the draft of the plaintiffs for the said cost thereof, as aforesaid, due protection on presentation thereof; that the plaintiffs did in accordance with the defendant's said employment and instruction, purchase at Mauritius for the defendant, and did ship the same at Mauritius for him, a large quantity of cane sugar at and within the said limit given by the defendant as aforesaid for Nos. 10 to 12, covering cost freight and insurance. And the plaintiffs did provide insurance, and drew upon the defendant for cost of the said purchase and shipment, as customary, attaching documents; and all things happened and were done, and all conditions precedent existed and were performed, necessary to entitle the plaintiffs to the performance by the defendant of his said promise. Yet the defendant did

1870

IRELAND v. LIVINGSTON.

not accept the sugar, and did not give the draft of the plaintiffs due protection, &c., on presentation thereof, nor has the defendant accepted or paid for the said sugar, whereby the plaintiffs were compelled at a great loss to take up the said draft and documents attached thereto, and to sell the sugars at a great loss, &c.

Pleas: 1. That the defendant did not promise as alleged.

2. That the plaintiffs did not purchase or ship sugar in accordance with the defendant's instructions.

3. That no draft of the plaintiffs for the said costs was presented as alleged.

4. That the employment and instruction to purchase and ship for the defendant a large quantity of cane sugar was an employment to purchase and ship as aforesaid, 500 tons, fifty tons more or less, of the said sugar; and that, save as aforesaid, the defendant never did employ or instruct the plaintiffs as alleged. And the plaintiffs never did purchase or ship 500 tons of the said sugar, fifty tons more or less, but only a much smaller quantity, that is to say, 400 tons. And that the alleged breach was, and is, the defendant's refusal to accept such smaller quantity of sugar and to give the plaintiffs' draft for the cost thereof due protection on presentation, and to pay for such sugar.

5. That the employment and instruction to purchase and ship for and on account of the defendant a large quantity of cane sugar was an employment to purchase a cargo of cane sugar of 500 tons, fifty tons more or less, and to ship the same at Mauritius in a ship that should call for orders for a good port in the United Kingdom, the defendant to have the option of sending the vessel to London, Liverpool, or the Clyde, and that, save as aforesaid, the defendant never did employ or instruct the plaintiffs as alleged; that the plaintiffs never did purchase a cargo of 500 tons of the said sugar, fifty tons more or less, but, on the contrary thereof, only a much smaller quantity, that is to say, 400 tons, and that they never did ship such smaller quantity in a ship that should call for orders for a good port in the United Kingdom, and never did procure for the defendant the option aforesaid, but, contrary to the terms of the said employment and instructions, shipped the same in a ship not calling for orders, and without procuring for the defendant any such option. That the alleged breach was, and is, the defendant's

refusal to accept the said smaller quantity of sugar, and to give the plaintiffs' draft for the cost thereof due protection on presentation, and to pay for such sugar.

Replications: 1. Taking and joining issue on the defendant's pleas.

2. To the 4th plea, that the employment and instruction were contained in a letter written and sent by the defendant to the plaintiffs on the 25th of July, 1864, and a certain telegram despatched on the next day by one David John Maitland, on behalf of the defendant to the plaintiffs. [The replication then set out verbatim the letter given, post, at p. 521, in paragraph 2, and the telegram given in paragraph 3.] That long before and at the time of the giving of the instruction and the time of the carrying of the same into execution, it was at Mauritius the usual customary and proper course of business in carrying out such instructions to buy such quantities of sugar as were procurable in the Mauritius, of divers persons there, and that it was then and there quite impossible to purchase of one seller, or at one time, or by one contract, such a quantity of sugar as in the above letter mentioned, and that it was customary, usual, and necessary for merchants and commission agents employed and instructed to purchase and ship for and on behalf of other persons such a large quantity of sugar to proceed to purchase for and on behalf of such other persons several smaller quantities of sugar from different sellers by several contracts, for the purpose of carrying into execution such employment and instruction and making up the whole large quantity intended to be purchased and shipped as aforesaid. That the plaintiffs did, in pursuance of the instruction given by the defendant, according to the common course of business and custom in Mauritius, proceed to purchase and did purchase for the defendant divers quantities of cane sugar, amounting in the whole to 400 tons, being the sugar in the declaration mentioned, at such a price that, at the rate of freight at which shipment was then obtainable, the same could be and was shipped at the limits given by the defendant according to the instructions given by the defendant. And though the plaintiffs exercised all due diligence, and did all things on their part to be done, in order to complete the purchase and shipment of the whole large quantity of sugar in the above letter mentioned,

1870

IRELAND v. LIVINGSTON.

yet they could not, while shipment was obtainable at the said rate of freight, purchase any further quantity at such a price that the same could be shipped at about the limits given by the defendant, and it then became impossible for them, according to the then current prices and rates of freight, to purchase and ship any further quantity than the said 400 tons, at about the limits given by the defendant, and the plaintiffs were always ready and willing to purchase and ship for the defendant a further quantity of sugar to make up the quantity in the above letter mentioned, if it should become possible to purchase and ship the same at about the limits given by the defendant within a reasonable time in that behalf, but more than such a reasonable time elapsed before it became possible so to do, and before such reasonable time had elapsed the defendant wrote and sent to the plaintiffs a letter. [The replication then set out the letter of the 24th of September, 1864, given in paragraph 17.] Wherefore, and by reason of the premises, and not otherwise, the plaintiffs forbore to purchase and ship for and on behalf of the defendant any further quantity of sugar beyond the said quantity of 400 tons. And the plaintiffs say that the above mode of carrying out the said instructions was the usual customary and proper mode of carrying them out at the Mauritius.

3. To 5th plea, repeating the allegations contained in the preceding replication, and, further, that it never was possible for the plaintiffs at about the limits given by the defendant to procure for the shipment of the said sugar a ship to call for orders for a good port in the United Kingdom, or to procure for the defendant the option of sending the vessel to London, Liverpool, or the Clyde.

The plaintiffs also demurred to the 4th and 5th pleas.

The defendant took and joined issue on the plaintiffs' second and third replications, and also demurred to them.

Joinder in demurrer.

The Court of Queen's Bench, on the 13th of November, 1866, gave judgment for the plaintiffs on the demurrers. (1)

The issues in fact came on for trial at the sittings in London,

(1) Law Rep. 2 Q. B. 99.

after Hilary Term, 1868, before Cockburn, C.J., when a verdict was taken for the plaintiffs, by consent, for 2403*l.* 3*s.* 9*d.*, subject to the opinion of the Court upon the following case.

1. The plaintiffs are merchants and commission agents, carrying on business at Mauritius. The defendant is a merchant at Liverpool, and occasionally imports sugar.

2. In July, 1864, the defendant sent to the plaintiffs, at Mauritius, the following letter:—"Liverpool, 25th July, 1864.—I have had the pleasure to receive several circulars and letters from you, and although many times prompted by the advice of Mr. Maitland to send orders to you, the chances of any good have appeared to me so remote I have not hitherto troubled you. My opinion is that, should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a maximum, say 26*s.* 9*d.* (for Nos. 10 to 12), and you may ship me 500 tons to cover cost freight and insurance. Fifty tons more or less, of no moment, if it enables you to get a suitable vessel. You will please provide insurance, and draw upon me for cost thereof, as customary, attaching documents, and I engage to give same due protection on presentation. I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but, if that is not compassable, you may ship to either Liverpool or London."

3. After the above letter had been written, Mr. Maitland, the plaintiffs' agent at Liverpool, called at the defendant's office, and, having been shewn a copy of the letter, suggested, though he had no instructions from the plaintiffs so to do, that it would be prudent for the defendant to have the following telegram sent to Mr. Ireland:—"In writing to Mauritius, say Mr. Livingston's insurance is to be done with average, and, if possible, the ship to call for orders for a good port in the United Kingdom." The defendant concurred with Mr. Maitland's suggestion, and Mr. Maitland, consequently, sent the above telegram to Mr. Ireland, who forwarded the same to the plaintiffs at Mauritius.

Both the letter of the 25th of July and the telegram were received by the plaintiffs at Mauritius by the same mail, on the 24th of August, 1864.

4. The price of sugar is not always exactly the same in the various

1870

IRELAND v. LIVINGSTON.

markets of the United Kingdom; for instance, the price of sugar at Bristol is sometimes 1*l.* per ton higher than the price at Liverpool; and it was this consideration which caused the defendant to concur, as before mentioned, with the suggestion of Mr. Maitland.

5. On the 6th of September the plaintiffs wrote to the defendant as follows:—"Mauritius, 6th September, 1864.—By the arrival of our packet of the 24th ultimo, we are in receipt of your esteemed favour of the 25th July, and take due note that, in the hope of some good being done by importing sugar, you authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 to 12 D. S. at a cost not exceeding 26*s.* 9*d.* per cwt., free on board, including cost freight and insurance, and your remarks regarding the destination of the vessel have also our attention.

"Prior to the receipt of last mail our market was firmly maintained at the high prices quoted in our last circular, but the advices then received have caused a considerable fall, and transactions in grey refining kinds, equal to No. 13 D. S., have since been made at $5.75 per 100 lbs., equal to a cost of about 28*s.* 9*d.*, f. o. b., with freight and insurance. Qualities inferior to No. 13 are still very scarce, and, indeed, owing to the great number of vacuum pans now employed on the estates, we fear it will henceforward be difficult to make cargoes averaging under this number. This crop is unusually late, having been retarded by a continuance of rainy weather, but, all the estates being now at work, we expect soon to see a good supply of sugar in the market, and prices may then recede a little further. We shall continue to keep your order carefully before us, and, if prices come within your limits, and we can lay in a good cargo, we shall not fail to operate for you. We enclose copy of our usual circular, which will serve to advise you fully regarding our market, and you will observe therefrom that our bi-monthly mail service is to commence on the 18th instant, when we anticipate again having this pleasure."

6. When the defendant's letter of the 25th of July reached the plaintiffs at Mauritius, the price of sugar and the rate of freight were too high to admit of the plaintiffs purchasing and shipping at the limit prescribed by the defendant in his aforesaid letter. Such limit and such sugar of the quality and description specified

in the said letter, are for convenience sake, hereinafter respectively called the defendant's limit and sugar of the specified quality.

Between the 2nd of August and the end of the following November, the current rate of freight to London direct, was never less than 2*l.* 15*s.* per ton, and the current rate of freight to Cork or Falmouth, for orders for any port in the United Kingdom, never less than 3*l.* per ton.

7. The plaintiffs, however, carefully watched the sugar market at Mauritius, and in the month of September, when sugar had fallen in price, they caused inquiries to be made whether it was not possible to obtain freight below the current rate, and in the course of the same month they obtained an offer of freight by the *Ilma* at the rate of 2*l.* 10*s.* per ton direct for London. This offer was made under the following circumstances:—The *Ilma* was a Russian barque which had been on the 29th of August laid on the berth at Mauritius for a voyage direct to London, at a rate of freight of 2*l.* 15*s.* per ton. At the time the aforesaid offer was made to the plaintiffs, 5000 bags of sugar had already been loaded on board of the *Ilma* at the rate of 2*l.* 15*s.* per ton, and the agents of the vessel were anxious to complete her loading and to despatch her as soon as possible, as her time charter had not much longer to run. They consequently made to the plaintiffs' brokers the aforesaid offer of freight at the rate of 2*l.* 10*s.* per ton, upon condition of their filling up the vessel with from 7000 to 8000 bags of sugar.

8. On receiving this offer the plaintiffs made inquiries of the different sugar brokers at Mauritius, and came to the conclusion that a large quantity of sugar of the specified quality could be probably obtained at such prices, as together with freight at 2*l.* 10*s.* per ton, and other usual charges, would bring the price of the sugar payable by the defendant to the plaintiffs within, or nearly within, the defendant's limit. It was impossible to purchase any large quantity of sugar of the specified quality in one lot or from the same person; but the plaintiffs succeeded on the 22nd, and on the morning of the 23rd of September, in purchasing from several brokers fourteen distinct lots of sugar of the specified quality.

1870

IRELAND v. LIVINGSTON.

These lots, which altogether consisted of 5788 bags, contained respectively different numbers of bags, the largest number contained in any one being 785, and the smallest 22, and the lots were purchased respectively at different prices, varying between 5 dollars and 30 cents, and 5 dollars and 60 cents, per 100 lbs.

9. On the 25th of September the plaintiffs accepted the offer of freight per *Ilma*, and engaged to ship on board of her from 7000 to 8000 bags of sugar at the rate of 2*l.* 10*s.* per ton.

10. The plaintiffs, although they exercised all due diligence in the matter, found it impossible to obtain any more sugar of the specified quality except at a price which would have made the price payable by the defendant to the plaintiffs exceed the defendant's limit. They accordingly, by the 27th of September, shipped the aforesaid 5788 bags of sugar on board the *Ilma*, on the defendant's account, and filled up the vessel with about 150 tons of sugar of an inferior quality on their own account. With this cargo the *Ilma*, on or about the 29th of September, sailed for London.

11. The usual and customary rate of commission charged by commission agents at Mauritius on purchases made there under instructions received from England, varies from $2\frac{1}{2}$ to 5 per cent. The commission which the plaintiffs usually charged was $2\frac{1}{2}$ per cent.

The plaintiffs, when they began to make the aforesaid purchases of sugar for the defendant, had no intention of charging a commission at a rate less than $2\frac{1}{2}$ per cent.; but they found on the completion of the purchases that if they charged a commission at that rate, the price payable by the defendant for the 5788 bags of sugar would exceed the defendant's limit, and in order to bring such price within that limit, they determined to charge, and charged the defendant, a commission of 300 dollars only, instead of a commission of $2\frac{1}{2}$ per cent., which would have amounted to 1119 dollars; the difference between 300 and the 1119 dollars, is equivalent to 163*l.* 19*s.* $4\frac{1}{2}$*d.*

12. The aforesaid 5788 bags of sugar weighed 81,412 French pounds, or between 392 and 393 English tons.

13. The plaintiffs duly insured the 5788 bags of sugar, and the cost price of the sugar, together with the costs of insurance, the expenses of shipment, and the commission of 300 dollars, amounted

to 45,093·97 dollars, or 9468*l.* 11*s.*, and for this sum the plaintiffs drew a bill of exchange upon the defendant, and remitted to him the bill with the usual shipping documents in letters of the 20th and 30th of September, 1864.

The amount of 9468*l.* 11*s.*, together with freight, which freight amounted to 1016*l.* 13*s.* 1*d.*

[14 and 15. Setting out letters from the plaintiffs to the defendant of the 23rd and 30th of September, 1864, advising the defendant of the above purchase and the shipment, with shipping documents, &c.]

16 and 17. After the plaintiffs had purchased and shipped the sugar, they continued to watch the market with the intention of completing the defendant's order if the price of sugar and rate of freight admitted of their doing so; but it was impossible for the plaintiffs to purchase and ship any more sugar within the defendant's limit up to or on the 26th of October, when they received the following letter, which the defendant wrote on the 24th of September (being the letter set forth in the plaintiffs' second replication):—"Liverpool, 24th of September, 1864.—"It escaped me to write to you in August, but I am hoping the tenor of my letter in giving you limits based upon the then probable deficiency in the beet crop, may have prevented your acting for me until I had further written to you, i.e., conjecturing that your advices from other correspondents would supply the information as to a fuller supply of beet. The large receipt from Cuba, coupled with the rise in the rate of discount and the break down of speculation, has completely upset our prices for sugar, and it is difficult to form any opinion as to the future of the article; I would prefer for the present to do nothing, and am satisfied that low rates must rule for some time, many parcels must be sold at almost any price the buyers will offer, and you may judge of the decline in our rates by the late sale of Clayed Manilla at 20*s.* 6*d.* I will write you further by the French steamer on the 7th of October, but I fear your prices are not likely to fall to a point commensurate with our probable rates.

"It seems more than likely the war in America must continue for a long time, and the re-election of the President is looked forward to now with all but certainty."

1870

IRELAND v. LIVINGSTON.

18. When a commission agent at the Mauritius receives instructions from England to purchase at the Mauritius so large a quantity as 500 tons of sugar of a specified quality within a prescribed limit, it is generally impossible for him to purchase the whole at one time, or at one price, or from one seller, and it is generally necessary for him to purchase the same at different times and in different lots or parcels.

If, according to the proper construction to be put upon the instructions which the plaintiffs received, as aforementioned, from the defendant, the plaintiffs had a discretion as to shipping the sugar on board a vessel direct for London, and were not absolutely bound to ship the same on board a vessel to call at a port for orders, then they acted in conformity with the usage of trade and the practice of commission agents at Mauritius in shipping the 5788 bags of sugar for the defendant, without waiting till they might be able to purchase more sugar of the specified quality within the defendant's limit.

If, according to the proper construction to be put upon the aforesaid instructions, the plaintiffs had no discretion as to shipping the sugar on board a vessel direct for London, but were bound to ship the same on board a vessel to call at a port for orders, then there is no usage of trade or practice of commission agents at Mauritius applicable to the question whether the plaintiffs would have been justified in shipping for the defendant the said 5788 bags of sugar on board a vessel to call at a port for orders.

[19 and 21. Setting out two letters, of the 6th of October and the 25th of November, 1864, from the defendant to the plaintiffs, explaining that the defendant refused to receive the sugar because the plaintiffs had not conformed to his orders.]

20 and 22. On the 10th of November, 1864, the bill of exchange for 9468*l.* 11*s.*, drawn by the plaintiffs upon the defendant, was presented for acceptance, and refused by the defendant; and on the 11th of September, 1865, the bill was presented for payment, and refused by the defendant.

23. After the defendant refused to pay the amount of the bill of exchange the plaintiffs caused the sugar to be sold in the London market on the 17th of February, 1865; and the sale realized 7065*l.* 7*s.* 3*d.*, after deducting the expenses of the sale; and it is

for the difference between this sum and 9468*l.* 11*s.*, the amount of the bill, that the present action is brought.

24. The Court is to be at liberty to draw all such inferences of fact as a jury would be justified in drawing.

If the Court shall be of opinion that the plaintiffs are entitled to recover, the verdict for them as aforesaid shall stand.

If the Court shall be of opinion that the plaintiffs are not entitled to recover, then a verdict is to be entered for the defendant.

The case came on for argument on the 16th of November, 1869, when judgment was given for the plaintiffs without argument, it being agreed that the point was the same as that already decided on the demurrers.

June 21. *Mellish, Q.C.* (*Sir J. B. Karslake, Q.C.*, with him), for the defendant. The defendant was entitled to judgment on the demurrers, as it is clear that the defendant's order contained in the letter of the 25th of July, 1869, and the telegram, was for 500 tons of sugar, with liberty to the plaintiffs to ship fifty tons more or less, if by so doing they could procure a ship at the given freight. The point is still clearer on the special case, as the plaintiffs' letter of the 6th of September, 1864, shews that one cargo of 500 tons by one ship was intended, and that the shipment of less than 400 tons was not a compliance with the order; and the defendant was, therefore, not obliged to accept the sugar or honour the draft.

[MARTIN, B., referred to *Kreuger* v. *Blanck.* (1)]

H. S. Giffard, Q.C. (with him *Raymond*), for the plaintiffs. This is not the case of vendor and vendee, but of agents purchasing on account of a principal. All the cases that can be cited to the point, from *Tamvaco* v. *Lucas* (2) to *Kreuger* v. *Blanck* (1) were cases between vendor and vendee. The instructions from the defendant to the plaintiffs were to purchase for him, and therefore the relation between them was that of agents and principal, though, as respects the persons of whom the plaintiffs purchased, the plaintiffs were the purchasers and the defendant a mere stranger. And the construction to be put on the order is, that the plaintiffs

(1) Law Rep. 5 Ex. 179. (2) 1 E. & E. 581; 28 L. J. (Q.B.) 301.

1870

IRELAND v. LIVINGSTON.

5 H.L. 411,

were to go into the Mauritius market and purchase, from time to time, on behalf of the defendant, according to the custom of that market; and this construction was expressly put on a similar contract in *Johnston* v. *Kershaw* (1) in conformity with the decision of this case in the Queen's Bench; and Kelly, C.B., expressed his regret that the custom had not been found in express terms as it was in *Ireland* v. *Livingston*. Unless the language of the order be so unambiguous as to exclude the custom, the custom of the market must be referred to to explain it: *Bayliffe* v. *Butterworth*. (2)

Mellish, Q.C., in reply. The order here is unambiguous, and the custom, if such it is, stated in paragraph 18 cannot affect the construction.

Cur. adv. vult.

June 23. The following judgments were delivered:—

CLEASBY, B. I am of opinion that the judgment of the Court of Queen's Bench ought to be affirmed, and I entirely agree with the reasons given by the Lord Chief Justice and Mr. Justice Mellor. (3)

The question to be determined is, what is the effect to be given to the order of the defendant dated the 25th of July, 1864, coupled with the custom stated in paragraph 18, taking also into account the answer of the plaintiffs of the 6th of September, 1864.

It is essential to give particular attention to what the nature of this transaction is. It is the case of an order sent from England to the Mauritius, afterwards added to by a telegram, but intended to be acted upon at once without further communication, and has reference not only to the sale of goods, but to the mode of sending them home.

It was the duty of the plaintiffs to act upon those instructions, unless, of course, they at once rejected them. They were not at liberty to retain this order in their hands and accept it, and then take no more notice of it, treating themselves as mere vendors, at their own option. There is a relation between the parties, independent of that of mere vendor and purchaser. It is to be observed that the plaintiffs are to draw upon the defendant for the cost, not for the price. In construing such an order, we must have reference to the object of

(1) Law Rep. 2 Ex. 82, 86. (2) 1 Ex. 425; 17 L. J. (Ex.) 78.
(3) Law Rep. 2 Q. B. at pp. 104, 106.

the parties and the subject matter, as well as any usage applicable to it.

The object of the order was to get 500 tons of sugar in the United Kingdom at a certain price, covering cost, freight, and insurance. This is founded upon an expectation, expressed in the order, of the failure of the beet crop causing a rise in the price of sugar. In my opinion this is the real object of the order, and that part of it which relates to one vessel is subordinate and optional. I mean optional, if not attainable. I do not mean that the having one vessel and one cargo was unimportant, because by having one vessel the defendant wished, in the first instance, to give the destination of London, Liverpool, or the Clyde to the cargo; and afterwards, by the telegram, he had the object of getting the option of sending the cargo to any port in the United Kingdom. The object of having one vessel was to get a command of the places to which the cargo was to go, according as the price at the time made one place more profitable than another; but still there was an order for the 500 tons at the limit, to be delivered at London or Liverpool.

I cannot read the letter as an order for a cargo. The word "cargo" is not mentioned in it. The use of the word "vessel" is accounted for by the subordinate object to which I have referred.

In the plaintiffs' letter of the 6th of September, 1864, they refer, of course, to what the defendant states in his letter he should *prefer*, and what he in the telegram wishes to be done, *if possible*, viz., one vessel to call for orders, and therefore one cargo; and I do not think it right to construe the order by an expression in that letter. I should rather look *to the conduct of the plaintiffs*, from which it clearly appears, that there being no opportunity of sending the whole order by one vessel, they intended to execute the whole order by sending it in parts, according to the usage; and they were prevented from completing the order and delivering all the goods by the defendant himself.

The finding in paragraph 18 is, in my opinion, conclusive of the case, and prevents this case from being the case of a mere sale and purchase of one indivisible lot or parcel of goods; because it is found as a fact that if the plaintiffs had (which means had upon the proper construction of the letter and telegram) an option as to

1870

IRELAND v. LIVINGSTON.

sending by a ship to call for orders, then the shipping in question was, by the usage, in conformity with the order; and it is plain that all that the defendant ever said was, that he preferred this being done, if possible, and that there was a discretion.

The learned counsel for the defendant was, therefore, compelled to contend that this finding as to the usage was inadmissible, because it contradicted the order or instruction, which must mean one cargo by one vessel.

I should be very sorry to exclude the usage, which is generally the most important part of transactions of this nature, and I see no reason for doing so. By the express terms of the order of the 25th of July, 1864, the plaintiffs are to draw for the cost as customary. I do not refer to that as shewing that any particular custom or usage is introduced, but only as shewing how properly what is customary forms a part of such an order.

I think to give judgment for the defendant would be to allow him, by means of optional and subordinate matters, added partly in a telegram, to throw, most unjustly, a loss upon the plaintiffs, who acted in perfect good faith throughout and in conformity with the usage.

I am, therefore, of opinion that the judgment of the Queen's Bench should be affirmed.

MONTAGUE SMITH, J. I also think the judgment of the Court of Queen's Bench should be affirmed.

It was contended for the defendant that the order given by him to the plaintiffs was for an entire quantity of not less than 450 or more than 550 tons of sugar to be shipped on board one ship as an entire cargo, and that he was not bound to accept and pay for the 400 tons purchased and shipped by the plaintiffs, although that quantity was bought and shipped within his limit, and the plaintiffs were willing to ship the remaining 100 tons at the same limit in another ship.

Mr. Mellish, who argued for the defendant, admitted that the question would have been the same if the plaintiffs had bought the whole quantity, but had shipped the 400 tons only, leaving the remaining 100 tons to come home in another ship. He could not, indeed, avoid making this admission, inasmuch as the plaintiffs were pro-

ceeding to purchase the remaining 100 tons to complete the quantity, when they were stopped by a letter from the defendant instructing them to discontinue purchases because of a fall in the price of sugar in the home market.

The question to be decided is therefore reduced to the point, whether, upon the true construction of the order, the shipment was to be made of the entire quantity in one ship as one cargo, and in the event of that not being possible, that no purchase and shipment should be made at all.

The letter of orders is not clear; but it seems to me that the primary and essential object of the order, to be collected from the language of the defendant's letter, was that the plaintiffs should purchase for him 500 tons of sugar within the prescribed limit as to price, and that, as subsidiary to that object, the plaintiffs were to ship in one vessel, *if possible;* but that this last stipulation was not a condition of executing the order, but a direction to be followed as nearly as possible. The letter says, "There may be a good chance of something being done by importing cane sugar about the limit I am going to give you as a maximum, say, 26*s.* 9*d.* for Nos. 10 and 12, and you may ship me 500 tons to cover cost freight and insurance." It seems to me the defendant has so expressed himself that the plaintiffs might well consider this as the governing part of the order. The defendant then adds, "fifty tons more or less of no moment if it enable you to get a suitable vessel." He concludes his letter thus, "I should prefer the option of sending vessel to London, Liverpool, or the Clyde, but if that is not compassable, you may ship to either Liverpol or London." It is clear from these directions that if the plaintiffs could not get this option, they might ship direct to "either Liverpool or London."

There was also a telegram sent out with reference to insurance, which has these words: "and, if possible, the ship to call for orders for a good port of the United Kingdom." These expressions, no doubt, shew a desire or expectation that the sugar might come home in one ship, but they do not seem to me to be the essential part of the order, nor to amount to a condition upon the orders to purchase and ship the sugar, but subsidiary directions which the plaintiffs were to follow, if possible, or as nearly as possible.

It appears from the case that, according to the ordinary course

1870

IRELAND v. LIVINGSTON.

of purchasing sugars in the Mauritius, it was not usual, or even possible, to buy the whole of the sugar at once, and that it is the usage there to make shipments of less than the whole quantity ordered, as they can be done.

I think, if the language of the order was clear and unambiguous to the effect that, unless the sugar could be shipped as one entire cargo, it should not be executed at all, that this usage could not control the order; but, as I have already said, according to my view, this is not the true meaning of the order, and therefore the plaintiffs were justified in following the usual course of things. If they could have bought and shipped within the limit the whole quantity in a single ship, it may be that they ought to have done so, and they might have been liable to an action for a breach of their duty as agents of the defendant for not doing so, if it had been possible. The measure of damages for such a breach of duty would not have been the loss caused by the fall in the price of the sugar, but the loss, if any, sustained by not shipping the sugar as an entire cargo; but in the actual case, it appears that the plaintiffs did their best for the defendant's interest, and have not laid themselves open to such an action.

I cannot doubt that if the price in the home market had risen and not fallen, and the plaintiffs had not bought and sent home the sugars when they could have done so within the defendant's limit, although not in one ship, the defendant would have complained of their putting the construction on the order which he now seeks to do for the purpose of throwing the loss occasioned by the fall in the price of sugar on his agents in the Mauritius.

The plaintiffs' letter accepting the order no doubt speaks of a cargo of sugar: but that cannot, as it seems to me, alter the interpretation of the order; and their subsequent execution of the order shews they did not interpret it as being conditional on their shipping an entire cargo.

The defendant himself stopped the further execution of the order before he knew what the plaintiffs had done under it, and it must be taken, as Mr. Mellish admitted, that the plaintiffs, but for this stoppage, would have completed the purchase and shipment of the whole quantity. As I have already observed, this state of things reduces the case to the single question, whether the order was for

one entire cargo to be executed only in the event of its being possible to ship such a cargo. For the reasons I have given I think that this was not so, and that the judgment of the Court of Queen's Bench ought to be affirmed.

MARTIN, B. I regret that I am of a different opinion, and I do so for two reasons. I very much regret a difference of opinion in the Court, but I also regret that the defendant should succeed in a controversy in which, in my judgment, he has taken advantage of what was an honest act on behalf of the plaintiffs for the purpose of relieving himself from the consequences of a falling market.

I had expected to take part in a written judgment, and had it been possible for me to have seen the Chief Baron's judgment I should merely have acceded to it; but that not having been possible, I must proceed to state my own views upon this matter.

In my judgment, the question entirely depends on the construction of two letters. In paragraph 18 of the case there is a statement made to which, I think, we can pay no attention: "When a commission agent at the Mauritius receives instructions from England to purchase at the Mauritius so large a quantity as 500 tons of sugar of a specified quality within a prescribed limit, it is generally impossible for him to purchase the whole at one time, or at one price, or from one seller, and it is generally necessary for him to purchase the same at different times and in different lots or parcels." That is no statement of a custom at all, but of what would always arise from such a transaction as this. It is a contract between vendor and vendee, and not a contract between principal and agent, as I shall be able to shew by direct authority which has been recognized for more than half a century. I apprehend that anywhere, when a great quantity is ordered of an article like sugar, which is originally an agricultural product, subjected to a course of manufacture for the purpose of bringing it into the market, and is produced by a number of different persons, the very nature of the order would of itself imply that the person who received the order was to get the article according to the order, and to purchase it himself, and that the merchant in this country had nothing to do with this transaction of purchase; and the defendant therefore had no privity whatever with regard to

1870

IRELAND v. LIVINGSTON.

the persons who sold the sugar to the plaintiffs in the Mauritius. It seems, therefore, to me, that that statement in paragraph 18 is unnecessary, and ought to have no bearing on the case. But then it is further stated: "If, according to the proper construction to be put upon the instructions which the plaintiffs received as aforementioned from the defendant, the plaintiffs had a discretion as to shipping the sugar on board a vessel direct for London, and were not absolutely bound to ship the same on board a vessel to call at a port for orders," certain conclusions follow. If that is a criterion, I am clearly of opinion that the plaintiffs had a discretion, and that they were not bound to ship the sugar on board a vessel to call at a port for orders. It is only necessary to read the letter to see that the plaintiffs had that discretion in the plainest possible terms. Then the 18th paragraph proceeds to state that "then they acted in conformity with the usage of trade, and the practice of commission agents at Mauritius in shipping the said 5788 bags of sugar for the defendant without waiting till they might be able to purchase more sugar of the specified quantity within the defendant's limit." If I thought that a conclusion which was obligatory on me in this case, I should now be prepared to give judgment for the plaintiffs; but, according to the best judgment I can form, it is not a matter which is binding on me in the least. I must look at the rest of the case to ascertain what were the true facts upon which, in my judgment, the liability of the defendant depends. The case then goes on to state: "If, according to the proper construction to be put on the aforesaid instructions, the plaintiffs had no discretion as to shipping the sugar on board a vessel direct for London, but were bound to ship the same on board a vessel to call at a port for orders, then there is no usage of trade or practice of commission agents at Mauritius applicable to the question whether the plaintiffs would have been justified in shipping for the defendant the said 5788 bags of sugar on board a vessel to call at a port for orders." It seems to me proper that I should state, before I proceed to what is the substantial part of my judgment, that I consider that I am by no means bound by those statements at all, and, in point of fact, so far as I am concerned, I throw them aside, and decide the case upon what I believe is the real question; and that is, what is the meaning of the letters?

1870

IRELAND v. LIVINGSTON.

The first question is, what is the character of this contract? Is it a contract between principal and agent, or a contract between vendor and vendee, and not a contract as between principal and agent? Upon that the case of *Feise* v. *Wray* (1) is a direct authority. The marginal note is: "A trader here gives an order to his correspondent abroad to ship him certain goods, which the latter procures upon his own credit without naming the trader here, and ships to him at the original price, charging only his commission." The facts in this case are much stronger. There the price which the trader abroad charged was the money which he actually paid to the producer, and the commission upon it. Here the plaintiffs would have made a perfectly valid contract if they had got the sugar at the cost price, and had charged the defendant for the sugar at a certain sum beyond what they had paid. "Held, that the correspondent abroad is so far a vendor as between him and the trader here that, on the bankruptcy of the latter, he may stop the goods in transitu by procuring the bill of lading from the bankrupt's brother, and this though the trader here, and before his bankruptcy, accepted bills drawn on him by his correspondent for the amount of the goods; such acceptances, proveable under his commission, amounting at most to part payment for the goods, which does not take away the vendor's right to stop in transitu." That case, therefore, is an authority in this case. I should say, not so strong a case as this, because the price was to be there the actual money paid to a purchaser, plus a commission, and yet it was held that the relation of vendor and vendee existed, which alone justifies the stoppage in transitu; and in all the judgments by Grose, Lawrence, and Le Blanc, JJ., it is said that it was a case of vendor and vendee, and not merely of agent and principal. Lord Ellenborough, who had lately come into the Queen's Bench, and who had been counsel in the case, declined to give any judgment, but he said he agreed with the other judges, and stated that it was the case of a vendor only adding to the original price of the goods the amount of his commission. That judgment was pronounced in the year 1802, and it was adopted by Chief Justice Abbott in his Text Book upon Shipping, and he states it thus (2): "A person abroad, who, in pursuance of

(1) 3 East, 93. (2) Abbott on Shipping, 4th ed. p. 380; see 11th ed. p. 421.

1870

IRELAND v. LIVINGSTON.

orders sent by a merchant of this country, purchases goods on his own credit of others (whose names are unknown to the merchant), and who charges the merchant a commission on the price, and consigns them to him, is a consignor within the meaning of this rule [as to stoppage in transitu]; in reality he is the vendor and the consignee the vendee."

I apprehend, therefore, that this correspondence proves that there was the relation of vendor and vendee. Then it is perfectly clear, as it seems to me, that what the defendant meant to buy and what the plaintiffs undertook to sell was an entire quantity of, say, 500 tons of sugar, and that it was not two quantities of sugar, to be sent one in one vessel and one in another. If it were, I see no reason why a quantity of 500 tons might not have been sent in five vessels, or any number of vessels. It seems to me that it was not the intention of the parties that that should be so. The defendant's letter, of the 26th of July, states his opinion that should the beet crop prove less than usual, there might be a chance of importing beneficially cane sugar, "at about the limit I am going to give you, as a maximum, say 26*s.* 9*d.* for Nos. 10 to 12, and you may ship me 500 tons to cover cost freight and insurance. Fifty tons more or less of no moment, if it enable you to get a suitable vessel." I quite agree that the clause, as to fifty tons more or less, has only a tendency to shew that this man clearly contemplated a single cargo, because it shews he contemplated the case of a ship which would bring 450 tons or 550 tons, and that he intended that he should have one entire bulk. The concluding part of the letter supports what I have already stated as the intention of the defendant: "I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but, if that is not compassable, you may ship to either Liverpool or London." But I would observe that I do not see how it could be argued that the plaintiffs had not the option to ship for Liverpool or London, when it is stated distinctly that they might. It seems to me the telegram that was afterwards sent has no bearing upon the point beyond this, that it shews that the defendant desired, instead of having the limited ports of London, Liverpool, or the Clyde, that he should have the liberty of sending the cargo to any port within the United Kingdom. Therefore, as far as

that part of the case is concerned, I do not see how any one can doubt that the plaintiffs had the option by that letter of sending the cargo to Liverpool or London. In answer to that letter the plaintiffs wrote on the 6th of September, after acknowledging the defendant's letter: "You authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 and 12 D. S., at a cost not exceeding 26*s.* 9*d.* per cwt., free on board, including cost freight and insurance, and your remarks regarding the destination of the vessel have also our attention." How could the plaintiffs have understood the letter of the 26th of July? That, as near as could be, they were to send a cargo of about 500 tons, and if they could get a vessel which could carry that amount, more or less by fifty tons, they might take that vessel and send the sugar by it. Therefore, this correspondence amounts to an agreement by one party to sell, and the other to purchase, a cargo of about 500 tons, which, as it seems to me, means in one bulk; and the defendant was bound to accept that quantity in one bulk and not in two bulks: otherwise there would be no limit to the number of the vessels. There is another part of the plaintiffs' letter which seems to me to confirm that: "We shall continue to keep your order carefully before us, and if prices come within your limits, and we can lay in a good cargo, we shall not fail to operate for you." It seems to me, therefore, that is a confirmation of the construction I have put on the order, and that the defendant was under no obligation to accept two bulks for this 500 tons; and 393 tons only having been sent, he had a right to reject it and insist that the contract had not been performed.

I believe I should have arrived at that conclusion if I had simply this case to deal with, but there was a case decided in the Exchequer of *Kreuger* v. *Blanck* (1), in last Easter Term. That was a case tried before me at Gloucester, and the case was this. A man in Gloucester had given an order for sixty fathoms of lathwood. The case turned on a written correspondence, and in it a cargo was mentioned, and it was clear enough that what was supposed by both parties at the time was, that this cargo was to come in one vessel from Sweden. But, in point of fact, the Swedish seller could not get a vessel exactly the size to hold the

(1) Law Rep. 5 Ex. 179, 183.

1870

IRELAND v. LIVINGSTON.

cargo, and accordingly he chartered a vessel which could carry several fathoms more. The plaintiff's agent separated the portion of the cargo which the defendant had ordered, and received from the captain a separate bill of lading for it, and drew a separate bill of exchange for the proceeds, and the cargo was tendered at Gloucester when the vessel arrived. It was held that, by the terms of the correspondence, although the actual thing which the man had ordered came in the vessel as parcel of the cargo, the vendee was justified in refusing to accept that lathwood, as he had contracted for a separate cargo. I drew a different conclusion from the facts, because I thought that it was not the substance of the contract that there should not be any other lathwood in the same ship with that which was intended for the defendant. But my Lord and my Brother Cleasby were of the contrary opinion. I adopt what is there laid down by my Brother Cleasby as the rule. He says: "The contract being contained in these letters, and the question turning on the construction of them, we must abide by the natural meaning of the terms used, unless some exceptional meaning is proved; and we cannot rely on any supposed inconvenience arising from that construction, unless some ambiguity or difficulty in the meaning of the words has first been pointed out. What, then, does 'cargo' mean? It means the cargo of the ship; that is, what is put on board the ship, or what the ship carries." I think that is the true rule to lay down, and in my judgment this contract is contained, and necessarily contained, in these letters, and it was for an entire bulk or cargo of about 500 tons of sugar to be brought to this country by one vessel, and to be delivered to the defendant at one and the same time; and, inasmuch as that was not done, but upwards of 100 tons less were sent in the vessel, the defendant was justified, in law, in refusing to accept it; and the consequence is, that in my opinion, the judgment of the Court of Queen's Bench ought to be reversed.

KELLY, C.B. I proceed to deliver the judgment of my Brother Channell, my Brother Keating, and myself.

The question in this case is, whether the order or authority from the defendant to the plaintiffs was to purchase a quantity of sugar to constitute one cargo, to be shipped by one vessel from the Mauritius to this country, or whether the plaintiffs were at liberty,

1870

IRELAND v. LIVINGSTON.

not only to purchase the sugar in several quantities, but to consign it to the defendant in several successive shipments and in different vessels.

It is, we think, to be regretted that this question was not submitted to a jury of mercantile men; but as it is raised and brought before us upon demurrer, and in the form of a special case, we must decide it for ourselves upon the documents before us.

The case depends entirely upon the two letters of the 25th of July and the 6th of September, 1864, and the telegram from the defendant to Mr. Ireland, together with the statements to be found in paragraph 18.

The defendant's letter of the 25th of July, is plainly an authority to purchase about 500 tons of sugar or any quantity not less than 450 or more than 550 tons, if the purchase of such quantity would enable the plaintiffs to get a suitable vessel. No question therefore, seems, at first, to arise as to the quantity. It was to be at least 450 and at most 550 tons. But we must next look to these letters and the telegram, and see whether they admit of any other construction than that this quantity of sugar, whatever it might be, was to constitute a single cargo, and to be shipped by a single vessel.

In the letter of the 25th of July, after specifying the quantity, the defendant first refers to the shipment in these words: "if it enables you to get a suitable vessel,"—in the singular number. Then "I should prefer the option of sending vessel to London, Liverpool, or the Clyde" (the word "vessel" here being also in the singular number) "but if that is not compassable, you may ship to either Liverpool or London." It is clear that the first branch of this direction points to a shipment by a single vessel which would call for orders at some port in the United Kingdom, and thence proceed according to the orders given, either to London, Liverpool, or the Clyde; and that it never was contemplated that several vessels should each call for orders, perhaps at different ports, and thence proceed, not to London, Liverpool, *or* the Clyde, but perhaps to two, or all three of these places of destination; and the word "vessel" being, as before observed, in the singular number, the direction will admit of no other construction than that the shipment should be in one vessel. The alternative is, that the

1870

IRELAND v. LIVINGSTON.

plaintiffs may ship to either Liverpool *or* London. This seems also to point to a single shipment to one, and to one only, of these two ports.

Next comes the telegram. Here again the words are, " if possible the ship to call for orders for a good port in the United Kingdom,"—the ship and port again in the singular number. But if any doubt could be raised upon the instructions, it seems to be put an end to by the letter of the plaintiffs of the 6th of September accepting the order. Here the words are express: " you authorize us to purchase and ship on your account *a cargo* of about 500 tons,"—the word *cargo* importing a single and complete shipment, and necessarily by one ship, the word being also in the singular number. Again in the latter part of the letter the plaintiffs say: " and if we can lay in *a good cargo* we shall not fail to operate for you." It seems to me impossible to put any other construction upon these documents, whether considered separately or together, than that the authority pointed to a single shipment of one cargo and by one single vessel.

It is obvious that upon any other construction of these documents, the transaction might have been subdivided into any number of shipments, and without any definite limit or specification as to the time or times of each successive shipment, or the port or ports of destination; one consequence of which might have been that after a shipment of some portion of the whole quantity, perhaps 100 tons, of sugar, the markets might have risen above the price limited, and the defendant, instead of a purchase of at least 450 tons, must have contented himself with 100 tons only. And this consequence might have followed after the shipment of the 400 tons actually made by the plaintiffs, if the letter of revocation had not been written by the defendant, who in such cases, would have received, instead of 450 tons, the minimum quantity authorized, 100 tons or 400 tons, and no more.

The statements in paragraph 18, upon which the arbitrator seems to have intended to raise the question, referred to by my Brother Martin, but which really does not arise, merely go to shew that the whole quantity of sugar required could not be obtained by a single purchase, and that it was not unusual, upon orders for large quantities of sugar, to ship them by different vessels. But no objection

1870

IRELAND v. LIVINGSTON.

is made to the sugar having been obtained by several purchases, so that the whole quantity had been made up and shipped by one vessel. And whatever may be the usage upon general orders, if the true construction of these letters be to limit the plaintiffs to a single shipment, no usage would entitle them to act in contravention of the express orders given.

I think, therefore, that both upon the special case and upon the demurrers, the defendant is entitled to judgment, and that the judgment of the Court of Queen's Bench should be reversed.

Judgment reversed.

Attorneys for plaintiffs: *Francis & Bosanquet.*
Attorneys for defendant: *Field, Roscoe, Field & Francis.*

JONES, APPELLANT; WHITTAKER, RESPONDENT.

June 8.

Exciseable Liquor—Beer—Billiard Licence—Beer Licence—8 *&* 9 *Vict. c.* 109, *ss.* 10, 11.

Exciseable liquors are liquors subject to the duty of excise; and, therefore, beer, upon which an excise duty is no longer paid, is not an exciseable liquor.

A. was licensed under 8 & 9 Vict. c. 109, to keep a house for billiard playing; and the licence provided that A. should not knowingly allow the consumption of exciseable liquors in the house by persons resorting thereto. He was also licensed under 3 & 4 Vict. c. 61, and 32 & 33 Vict. c. 27, to sell beer, wine, &c., to be consumed in the house. A. had allowed the consumption of beer by persons resorting to the house for the purpose of playing billiards, and was convicted of an offence against the tenor of his billiard licence:—

Held, that A. had not been guilty of selling exciseable liquor, and was wrongly convicted.

CASE stated, under 20 & 21 Vict. c. 43, by the Stipendiary Magistrate for Manchester.

The appellant was charged that he, on the 1st of December, 1869, at the city of Manchester, then being duly licensed to keep a house for public billiard playing there situate, under the provisions of the statute in that behalf, unlawfully and knowingly did allow the consumption of a certain exciseable liquor in his house, to wit, beer, by certain persons then resorting thereto, against the tenor of his licence and contrary to the statute.

1870

JONES v. WHITTAKER.

It was proved, on the hearing of the complaint, that the appellant was the occupier of a house situate in the city. The appellant was duly licensed, under 3 & 4 Vict. c. 61, and 32 & 33 Vict. c. 27, to sell beer, wine, and cider to be consumed in the house.

The appellant was duly licensed, under 8 & 9 Vict. c. 109, to keep the house for public billiard playing; such last-mentioned licence was in the form contained in schedule 3 to 8 & 9 Vict. c. 109, and contained the following proviso: "Provided that he (the appellant) put and keep up the words 'licensed for billiards,' legibly printed in some conspicuous place near the door, and on the outside of the said house, and do not wilfully or knowingly permit drunkenness or other disorderly conduct in the said house, and do not wilfully or knowingly allow the consumption of exciseable liquors therein by the persons resorting thereto," &c.

The appellant kept a billiard table in the house; the house was resorted to by the public for the purpose of billiard playing, and the public did in fact play at billiards in a room there, and at the same time the appellant allowed beer to be consumed in the house and premises.

The following objections were thereupon raised on behalf of the appellant.

1. That beer was not an exciseable liquor.

2. That the meaning of the words "the consumption of exciseable liquors therein by the persons resorting thereto," was, that the appellant was not to allow the "unlawful" consumption of exciseable liquors on the premises.

3. That (assuming beer was an exciseable liquor) the appellant could not be convicted, he having been duly licensed to sell the same to be consumed on the premises.

The magistrate overruled the objections, and convicted the appellant.

The question was, whether the conviction was right in law.

Ambrose, for the appellant. The 8 & 9 Vict. c. 109, allows licences to be granted for public billiard playing, and one of the terms contained in the form given in schedule 3 is, that the holder do not knowingly permit drunkenness. If the legislature had intended that a person holding a billiard licence should not sell beer,

they would have stated so in direct terms, and not merely have forbidden the excessive consumption of beer. Moreover, beer is not an exciseable liquor. The appellant holds two licences, one licence for billiard playing, already mentioned, and one for the sale of beer under 3 & 4 Vict. c. 61, and 32 & 33 Vict. c. 27. There is now no excise duty on beer: a duty was imposed by 12 Car. 2, c. 24, but that has been repealed by 11 Geo. 4 & 1 Wm. 4, c. 51, s. 2. No liquor is an exciseable liquor unless it is liable to pay an excise duty: *Reg.* v. *Lancashire.* (1) Here the tax is imposed on the person selling.

C. H. Hopwood, for the respondent. The form of the billiard licence expressly prohibits the sale of exciseable liquor. Beer is an exciseable liquor in the popular sense of the term, in which sense it is used by the legislature. Beer was expressly declared to be so by 9 Geo. 4, c. 61, s. 37. The latest instance of calling beer an exciseable liquor occurs in 32 & 33 Vict. c. 27, s. 16, which imposes a penalty on a licensed person who is convicted "of keeping his house open for the sale of or of selling beer, cider, wine, spirits, or any other exciseable liquor." By 11 Geo. 4 & 1 Wm. 4, c. 51, all except the hereditary duties on beer are repealed, but the hereditary duties are merely suspended. They therefore do exist, and by virtue of them beer is an exciseable liquor. The case of *Reg.* v. *Lancashire* (1) is a case in which the facts were very peculiar: the excise duty had been expressly repealed on the liquor which was alleged in the information to be exciseable.

MELLOR, J. I am of opinion, on the authority of *Reg.* v. *Lancashire* (1), that beer does not fall within the description of "exciseable liquor." It has been argued that the legislature still considers beer to be an exciseable liquor, as it is said to be so treated in s. 16 of 32 & 33 Vict. c. 27, where the words used are, "beer, cider, wine, spirits, or any other exciseable liquor." I think that the rule of construction is that the words other "exciseable liquor" applies to the last antecedent; if the word last in order had been beer, the effect of the section might have been different. We cannot take this section as any guide in the present case. I think this case must be governed by the rule laid down in *Reg.* v. *Lan-*

(1) 7 E. & B. 839; 26 L. J. (M.C.) 171.

1870

JONES v. WHITTAKER.

cashire (1), that in order to be exciseable, a liquor must pay an excise duty. This was the decision of the majority of the Court, from which Erle, J., differed, but we are bound by the decision. It was further argued that, as the hereditary duties on beer were only suspended by 11 Geo. 4 & 1 Wm. 4, c. 51, beer was still an exciseable liquor; but as long as the duties are not payable, they are in effect abolished, and merely taking out a licence to sell beer does not make it an exciseable liquor. I think, therefore, the conviction must be quashed.

PIGOTT, B. (2) I quite agree in the opinion of my Brother Mellor. I think *Reg.* v. *Lancashire* (1) is an express authority that exciseable liquors are those only which pay an excise duty. If any mischief results from the keeper of a billiard room selling beer, the remedy is in the hands of the justices; they need not grant to the same person a licence to keep a billiard room, and also a licence to sell beer.

Conviction quashed.

Attorney for appellant: *E. R. Randell.*

Attorneys for respondent: *Johnson & Weatheralls.*

June 18

[IN THE EXCHEQUER CHAMBER.]

FORD AND OTHERS *v.* COTESWORTH AND ANOTHER.

Ship and Shipping—Charterparty—Contract implied where Charterparty silent as to Time for Discharge—Demurrage—Vis major.

Where a charterparty provides that the ship shall proceed to a certain port, and there, or so near thereto as she can safely get, deliver the cargo in the usual and customary manner, the contract to be implied is, that the shipowner and charterer will each use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls upon him; and, inasmuch as the discharge is a joint act of both parties, neither party can sue the other for delay arising from a cause over which he had no control.

Where, therefore, a ship, under such a charterparty, was in the course of un-

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(1) 7 E. & B. 839; 26 L. J. (M.C.) 171.

(2) Pigott, B., was sitting in the second division of the Court of Queen's Bench, under the Judges Jurisdiction Act, 1870 (33 Vict. c. 6), ss. 2, 4.

loading, and, owing to a threatened bombardment of the port, the authorities there refused for several days to allow any more of the cargo to be landed, the shipowner cannot recover damages from the charterer for the delay.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the plaintiff. (1)

The pleadings and facts are fully set out in the report in the Court below.

The first count was for not unloading with reasonable despatch a ship of the plaintiffs chartered by the defendants; second count for demurrage.

Pleas to the first count: 1. That it was not agreed as alleged. 2. A traverse of the breaches. 3. That the delay was caused by the restraints of princes and rulers, for which defendants were not liable by reason of a clause in the charterparty.

To the other count: Never indebted.

Issues joined.

A charterparty was entered into by the plaintiffs as shipowners, and defendants as charterers, by which it was "agreed that the ship shall take in a full cargo of the defendants, and proceed to Lima or Valparaiso, and there, or so near thereto as she may safely get, deliver the said cargo in the usual and customary manner, agreeable to bills of lading, and so end the voyage. . . . Restraints of princes and rulers, &c., . . . throughout this charterparty always excepted."

The ship having loaded a full cargo was ordered to Lima, and having arrived off Callao, the port of Lima, she commenced unloading. At that port goods can only be landed by lighters (which are provided by the merchant) and only through the custom-house. After the ship had unloaded a small part of the cargo, the authorities of the port refused to allow any more cargo to be landed, as the custom-house would be exposed to the fire of the Spanish fleet, which, it was apprehended, was about to attack and bombard the port; and the ship remained at her berth for seven days doing nothing, no more lighters being sent by the defendants, owing to this refusal of the authorities to allow any cargo to be landed.

A verdict was directed by Cockburn, C.J., for the defendants, with leave to the plaintiffs to move to enter it for 105*l.*, being 15*l.* for

(1) Law Rep. 4 Q. B. 127.

1870

FORD v. COTESWORTH.

each day; a rule was accordingly granted, which the Court of Queen's Bench discharged, on the ground that under the above charter the contract to be implied was only that each party would use reasonable diligence in performing that part of the delivery which, by the custom of the port, fell upon him; and that the defendants were, therefore, not liable for a delay caused by no fault of theirs. (1)

Field, Q.C. (*Philbrick* with him), for the plaintiffs.

Milward, Q.C. (with him *C. Russell*), for the defendants.

The arguments were the same as in the Court below.

The following authorities were cited: *Barker* v. *Hodgson* (2); *Randall* v. *Lynch* (3); *Barret* v. *Dutton* (4); *Kearon* v. *Pearson* (5); *Rodgers* v. *Forresters* (6); *Burmester* v. *Hodgson* (7); *Hawes* v. *Humble* (8); Abbott on Shipping, 4th ed. p. 195, 11th ed. p. 268 (cited in the judgment in the Court below). (9)

KELLY, C.B. We are all of opinion that the judgment must be affirmed. The action is for a breach of contract contained in a charterparty, whereby it was "agreed that the plaintiffs' ship should take on board a full cargo for the defendants, the charterers, . . . and proceed to Lima or Valparaiso, and there, or as near thereto as she might safely get, deliver the cargo in the usual and customary manner, agreeable to bills of lading, and so end the voyage." And the question is, what does that agreement import, what is the contract on the part of the plaintiffs, and what on the part of the defendants? Primâ facie there is an absolute contract on the ship, that is, on the plaintiffs, the shipowners, to deliver the cargo; but it is to be in the usual and customary manner; and, no doubt, it is rightly contended that that imposes a correlative obligation on the defendants that they will do all that is usual and necessary on the part of the consignees to effect the delivery by acceptance of the goods. The usual and customary manner of delivery at the port of Callao appears to be, that the consignees

(1) Law Rep. 4 Q. B. 127.
(2) 3 M. & S. 267.
(3) 2 Camp. 352; 12 East, 179.
(4) 4 Camp. 333.
(5) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(6) 2 Camp. 483.
(7) 2 Camp. 488.
(8) 4 Camp. 327.
(9) Law Rep. 4 Q. B. at p. 136.

are to supply lighters sufficient to carry the goods, and the ship-owners are to convey or assist in conveying the goods from the ship to the lighters, and then the consignees are to convey them to the shore, and land them at the custom-house. It appears that the ship arrived off the port, and after a small part of the cargo had been landed, the defendants having furnished several lighters, in consequence of the apprehended bombardment of Callao by the Spanish fleet, an order was made by the authorities strictly forbidding the landing of any more goods and placing them in the custom-house. In consequence of this order no more lighters were sent, and for some days the ship lay doing nothing. The action is brought against the defendants for demurrage or damages for this delay. I was from the first prepared to agree with the Court of Queen's Bench in treating the delivery of the cargo at the port of destination as one entire act, in which both parties have to perform their parts; the defendants have to provide lighters and the plaintiffs to assist in putting the goods over the side of the ship; and the plaintiffs were as much prevented from doing their part as the defendants. For had the defendants provided lighters, as it was contended they ought to have done, notwithstanding the order not to land any more goods, no doubt the authorities would have prevented the goods from being put on board the lighters; and it is absurd to suppose that the goods could have been put into seventy or eighty lighters, and left floating in the harbour. It is clear that the effect of the order forbidding the landing of goods was to prevent, not only the defendants from performing their part, but also to render it practically impossible for the plaintiffs to perform theirs. Although it might not have been rendered physically impossible to put the goods over the side of the ship, yet the whole process of landing was prevented by a cause over which neither party had any control; and, consequently, this action is not maintainable.

MARTIN, B. I am of the same opinion. The cases on the subject are collected in Maude and Pollock on Shipping (3rd ed. pp. 306—307); and it is laid down that, according to the authorities, the fact of the delay being caused by the act of God, or other vis major, does not relieve the charterer or freighter from liability

1870

FORD v. COTESWORTH.

for demurrage where the loading or unloading is to be done in a certain time; and I have no doubt that is the true principle where the freighter has entered into a positive undertaking to load or discharge a cargo in a given number of days; but there the liability is created by the freighter's own act in entering into the positive undertaking. But in this case there is only an implied contract on the part of the defendants; for there is no positive contract whatever on their part; and I am not aware of any case which goes to impose, by mere implication of law, without any stipulation whatever, so unreasonable a liability as that which the plaintiffs seek to impose on the defendants, that they are to be answerable for the delay caused by vis major. In *Appleby* v. *Myers* (1), in this court, where the plaintiff had contracted to erect machinery on the defendant's premises, and the completion of the work was prevented by a fire, it was held that this was an accident from the consequences of which both parties might suffer, but that neither had a cause of action against the other. So here I admit that the contract is to be read as impliedly binding the defendants to unload in the usual and customary manner, that is to say, they must provide the lighters, and take the goods from the ship; but the plaintiffs are also to deliver over the side into the boats; and the unloading or landing of the goods was thus a work to be performed by both parties; and the performance of this was prevented for several days by vis major; and there was, therefore, no breach of their contract by either party.

It is said that, notwithstanding the order of the customs authorities, the defendants ought to have provided lighters and received the goods on board; but if they had, the lighters must have been left floating with the goods on board. Such a proposition is absurd on the face of it. The threatened bombardment of the port and the consequent order prevented the landing of the goods, and this was a misfortune caused by vis major; each party must therefore bear the loss he has suffered from it.

For my own part, I do not see why the clause, "restraints of princes and rulers, &c., throughout this charterparty always excepted," should not apply to the present circumstances; but I

(1) Law Rep. 2 C. P. 651.

agree, without reference to this clause, that the defendants are not liable, and that the judgment of the Queen's Bench ought to be affirmed.

1870

FORD v. COTESWORTH.

CHANNELL and CLEASBY, BB., KEATING, MONTAGUE SMITH, and BRETT, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Clarke, Son, & Rawlings.*

Attorney for defendants: *Lydall.*

Banks v. [illegible] (1870) L. R. 5 Q. B.

549. Considered. BATTAN SINGH AND OTHERS v. AMIRCHAND AND OTHERS [1948] A. C. 161

BANKS *v.* GOODFELLOW.

July 6.

Testamentary Capacity—Partial Unsoundness of Mind—Mental Delusions.

Partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will.

At a trial as to the validity of a will, in favour of the testator's niece, it appeared that the testator made the will in 1863; he had been confined as a lunatic, for some months in 1841; and he remained subject to delusions, that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present; and these delusions were shewn to have existed between 1841 and the date of the will, and also between that date and his death in 1865. As to the testator's general capacity to manage his affairs, &c., the evidence was contradictory; but it was admitted that at times he was incapable of making a will. The jury were directed to consider whether, at the time of making the will, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it; and they were further directed that the mere fact of the testator's being able to recollect things, or to converse rationally on some subjects, or to manage some business, would not be sufficient to shew he was sane; while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to shew he was insane; and that the whole burden of shewing that the testator was fit at the time was on the party claiming under the will:—

Held, that the direction was practically right; for that it was immaterial whether the delusions remained latent or not at the time, if the testator was otherwise competent to make a will, as neither of the delusions—the dead man being in no way connected with the testator—had, or could have had, any influence upon him in disposing of his property.

EJECTMENT for fifteen messuages or dwelling houses situate at Keswick.

The defendant defended for the whole.

PC on costs in January 2014

(1870) (L.R. 5 Q.B. 549; Statement of COCKBURN, C.J. 565; 22 BATTAN AND .. [1948] 1 All E.R. 152

1870

BANKS v. GOODFELLOW.

At the trial before Brett, J., at the Cumberland spring assizes, 1869, it appeared that the action was brought by the plaintiff, as heir at law of John Banks, deceased, to try the validity of a will made by the latter, on the 28th of December, 1863, in favour of Margaret Goodfellow.

The testator had an only sister of the whole blood; but she was dead at the time the will was made, and her only child, the said Margaret Goodfellow, lived with him, and was his heir at law. The testator had also an only brother of the half blood, Jacob Banks, who was also then dead; he was father of John Banks, the plaintiff, and of several daughters. The testator died, unmarried, on the 28th of July, 1865. The will devised the whole of the testator's real and personal property to Margaret Goodfellow absolutely. She died unmarried, and under age, in 1867. The defendant was her half brother and heir at law.

The question at the trial was the capacity of the testator to make a will on the 2nd of December, when instructions given for the will were provisionally executed as a will, or on the 28th of December, 1863, when the formal will was executed. The evidence was very long and contradictory on the point; but it was admitted that at times the testator was incapable of making a will.

The following is a copy of the direction of the learned judge to the jury:—"It is admitted that from time to time the testator was so insane that he was incapable of making a will. The question is whether, on the 2nd of December, 1863, or on the 28th of December, 1863, or on both, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it. The mere fact of his being able to recollect things, or to converse rationally on some subjects, or to manage some business, is not sufficient to shew he was sane. On the other hand, slowness, feebleness, and eccentricities, are not sufficient to shew he was insane. The whole burden of shewing that the testator was fit at the time is on the defendant in this case. In order to determine whether the testator had a lucid interval when the wills or either of them were made, it may be important to consider what was the extent and nature of his admitted general insanity."

The jury found a verdict in favour of the defendant, saying the will was a good and valid will.

A rule was obtained for a new trial on the ground of misdirection, and that the verdict was against the weight of evidence.

The facts of the case, the arguments of counsel, and the cases cited, fully appear in the judgment of the Court.

Jan. 11 and May 13. *Manisty, Q.C., Aspinall, Q.C.,* and *Kemplay,* for the plaintiff.

Holker, Q.C., and *C. Hutton,* for the defendant.

Cur. adv. vult.

July 6. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Hannen, JJ.) was delivered by

COCKBURN, C.J. This is an action brought by the plaintiff, as heir at law of John Banks, to try the validity of a will made by the latter in favour of one Margaret Goodfellow; of whom, she having died since the decease of the testator, the defendant is the heir. The question in issue at the trial was the capacity of the testator to make a will.

Instructions for the will, taken by the attorney who prepared it, were signed by the testator and attested by witnesses in his presence, on the 2nd of December, 1863; the will, formally prepared from such instructions, was duly executed on the 28th of the same month. The question is, whether on both or either of those days the testator was of sound mind, so as to be capable of making a will.

It is a fact beyond dispute that the testator, John Banks, had at former times been of unsound mind. He had been confined, as far back as the year 1841, in the county lunatic asylum; discharged, after a time, from the asylum, he remained subject to certain fixed delusions. He had conceived a violent aversion towards a man named Featherstone Alexander, and notwithstanding the death of the latter some years ago, he continued to believe that this man still pursued and molested him; and the mere mention of Featherstone Alexander's name was sufficient to throw him into a state of violent excitement. He frequently believed that he was pursued and molested by devils or evil spirits, whom he

1870

BANKS v. GOODFELLOW.

believed to be visibly present. Besides these delusions, which were spoken to by two witnesses whose evidence was above suspicion, the one a medical man who attended him from 1856 to the end of 1862, the other the clergyman of the parish in which the testator resided, there was a body of evidence which, if believed, was strong to establish a case of general insanity. The jury, however, found in favour of the will, and therefore must have believed this evidence to be greatly exaggerated, or must have come to the conclusion that the will was made during a lucid interval.

From September, 1863, he had a succession of epileptic fits, and a blister was applied to his head, and the medical man who attended him throughout this period, deposed that his mental power, such as it was, suffered from the fits, and that he considered him insane, and incapable of transacting business during the whole time.

On the other hand, it appeared that the testator managed his own money affairs (which, however, were on a limited scale), and was careful of his money. According to the evidence of a witness named Tolson, who had acted as his agent in receiving the rents of some cottage property at Keswick, amounting to about 80*l.* a year, the testator had not only always shewed himself capable of transacting business with him, but had also on the last occasion of Tolson's coming to pay the rents, suggested to him to take a lease of the cottages in question, so as to relieve him (the testator) from all risk or trouble in the matter. He had also desired Tolson, when he came to pay over the next half-year's rents, to bring with him a Mr. Ansell, an attorney of Keswick, as he wanted to see him about making a will. On the 2nd of December, 1863, Tolson went to Arkleby, where the testator lived, taking Ansell with him. On their arrival, the testator, according to the statement of Ansell and Tolson, told Ansell he wished to make his will. He fetched from his room a will which he had made in 1838, in favour of his sister, who had since died, and said he wished to give all his property to his niece, Margaret Goodfellow, in the same way. On Mr. Ansell asking who should be the executors, the testator turned to his niece, who was present, and asked who she thought should be executors; whereupon she desired that Tolson should be one, and asked who should be the other, when the name of the other

executor, Thirlwall, was suggested by a person present, and assented to by the testator. The instructions thus received by Ansell were put down by him on paper, and having been read over to the testator, were, by the desire of Ansell, signed by him, and his signature was formally attested by two witnesses, so as to make the paper a sufficient and valid will, although it was intended that a more formal document should afterwards be prepared and executed; the reason given by Ansell for such signing and attestation of the instructions being, that he always pursued this course when his clients lived at a distance from him, and time would be required between the taking the instructions and the final completion of the will. The distance between Keswick and Arkleby is about twenty miles, and the road was said to be bad.

After the matter of the will had been disposed of, a conversation took place concerning the proposed lease to Tolson. The testator calculated the amount of the rents, and finding that they came to 80*l.*, offered Tolson a lease of the cottages for seven years, at a rent of 76*l.* a year. This being agreed to by Tolson, Ansell was instructed to prepare a lease on these terms; and the instructions, having been reduced to writing, were signed by the testator and Tolson. After this, Tolson proceeded to settle with the testator for the rents received by him, which amounted to 40*l.* 7*s.* 4*d.* Of this Tolson produced 29*l.* in cash, and offered his cheque for the remainder, but the testator observed that a cheque would be of no use to him, as there was no bank near, and desired Tolson to pay the balance into a bank at Keswick, at which the testator had an account. After this, a conversation ensued with a Mrs. Routledge, at whose house the testator lodged, as to the amount which he should pay her weekly for his board and lodging combined, which, if truly reported, tended strongly to shew that he was then capable of managing his affairs.

On the 28th of December Tolson took over the will and lease, which had been prepared by Ansell, to the testator, who, having read them two or three times, said they were all right, after which both instruments were executed by him, and the will was duly attested.

The testator lived till July, 1865. His niece, Margaret Goodfellow, survived him, but died in 1867, under age and unmarried.

1870

BANKS v. GOODFELLOW.

She was his heir at law. He had other nephews and nieces, to whom he is said to have been attached. The effect of the will, if valid, is, that the property goes to the defendant, who is no relation in blood to the testator, as the heir at law of Margaret Goodfellow, instead of to any relative of the testator. This possible consequence of Margaret Goodfellow dying without issue and intestate, does not, however, appear to have presented itself to the mind of any of the parties at the time of making the will.

Upon this evidence, the learned judge left it to the jury to say, "whether, on the 2nd of December, 1863, or on the 28th of December, 1863, or on both, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in the disposition of his property, and act upon it;" the learned judge telling the jury that "the mere fact of his being able to recollect things, or to converse rationally on some subjects, or to manage some business, would not be sufficient to shew he was sane; while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to shew he was insane;" with the further direction that "the whole burden of shewing that the testator was fit at the time was on the defendant." The jury returned a verdict for the defendant, saying that they found that the will "was a good and valid will."

The present rule was applied for and obtained on two grounds, first, that the judge misdirected the jury; secondly, that the verdict was against the weight of the evidence. The alleged misdirection is that the learned judge, in leaving to the jury the question whether at the time of making the will the testator was free from delusions, did not proceed to tell them that though the delusions, under which the testator had undoubtedly before laboured, might not have been present to his mind at the time of making the will, yet, if they were latent in his mind, so that, if the subject had been touched upon, the delusions would have recurred, he was of unsound mind and therefore incapable of making a will.

We must take it, for the present purpose, as a fact, that the testator, though generally of weak intellect, was able to manage his own affairs, and, apart from the delusions under which he laboured, was, at all events at the time of executing one or both of the

testamentary instruments in question, of sufficient testamentary capacity. We must also take it that no delusion manifested itself at the time of making the will. On the other hand, there is ample proof that the delusions existed in the interval between the making of the will and the death of the testator, as they had done before; and it is therefore quite possible that these delusions may have remained, at the time of making the will, uncured and latent in the testator's mind, and capable of being evoked and reproduced at any moment, if anything had occurred to lead his thoughts to the subject.

The inquiry not having been directed to this point, it is quite possible that all that the jury meant in finding in the affirmative of the question whether the testator was "free from delusions" at the time of making his will, was that the delusions were not present to his consciousness, not that they were eradicated from his mind; and that if the question had been specifically put to them whether the delusions still remained latent in the testator's mind, and his mind was to the extent of these delusions unsound, they would have found in the affirmative.

It therefore becomes necessary to consider how far such a degree of unsoundness of mind as is involved in the delusions under which this testator laboured would be fatal to testamentary capacity; in other words, whether delusions arising from mental disease, but not calculated to prevent the exercise of the faculties essential to the making of a will, or to interfere with the consideration of the matters which should be weighed and taken into account on such an occasion, and which delusions had in point of fact no influence whatever on the testamentary disposition in question, are sufficient to deprive a testator of testamentary capacity and to invalidate a will.

We must assume, for the present purpose, that the testator laboured under the insane delusions ascribed to him; but, on the other hand, that these delusions had not, nor were calculated to have, any influence on him in the disposal of his property; and that, irrespective of these delusions, the state of his mental faculties was such as to render him capable of making a will. For, whatever may have been the evidence as to general insanity, the verdict of the jury, which there was ample evidence to support, and in

1870

BANKS v. GOODFELLOW.

which the learned judge who presided at the trial states that he concurs, establishes that at the time of making the will, irrespectively of the delusions referred to, the testator was sufficiently in possession of his faculties.

The question whether partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to the particular testamentary disposition, will be sufficient to deprive a person of the power of disposing of his property, presents itself here for judicial decision, so far as we are aware, for the first time. It is true that, in the case of *Waring* v. *Waring* (1), the Judicial Committee of the Privy Council, and, in the more recent case of *Smith* v. *Tebbitt* (2), Lord Penzance, in the Court of Probate, have laid down a doctrine, according to which any degree of mental unsoundness, however slight, and however unconnected with the testamentary disposition in question, must be held fatal to the capacity of a testator. But in both these cases, as we shall presently shew, the wide doctrine embraced in the judgment was wholly unnecessary to the decision, and we therefore feel ourselves warranted, and indeed bound, to consider the question as one not concluded by authority, and on which we are called upon to form our own judgment. The question is one of equal importance and difficulty, and we have given it our best consideration.

The text-writers throw no light upon the point. They content themselves with stating in general terms that to be capable of making a will a man must be of sound disposing mind and memory, and that persons non compotes cannot make a will; but they are silent as to the degree of mental disturbance which will amount to a want of disposing mind and memory. The cases prior to *Waring* v. *Waring* (1), in which the law on the subject of mental unsoundness, as affecting the capacity to make a will, has come into question, are by no means numerous. It may be as well to pass them in review.

In *Combe's Case* (3) it is said to have been agreed by the judges, "that sane memory for the making of a will is not always where the party can in some things answer with sense, but he ought

(1) 6 Moo. P. C. 341.
(2) Law Rep. 1 P. & M. 398.
(3) Moore, 759; s. c. 8 Vin. Abr. 43, No. 22.

to have judgment to discern and to be of perfect memory, otherwise the will is void." So, again, in the *Marquis of Winchester's Case* (1), "By the law, it is not sufficient that the testator be of memory, when he makes the will, to answer familiar and usual questions, but he ought to have a disposing memory, so as to be able to make a disposition of his estate with understanding and reason." In the case of *Greenwood* v. *Greenwood* (2), an action brought to recover estates under a will, the validity of which was disputed, the principal indication of insanity relied on being a strange aversion on the part of the testator towards his only brother, his heir at law, and a groundless suspicion of the latter having attempted to poison him, Lord Kenyon, in charging the jury, said: "I take it a mind and memory competent to dispose of property, when it is a little explained, perhaps may stand thus:—having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had a power of summoning up his mind, so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will." In other cases, such as the well-known case of *Dew* v. *Clark* (3), the insane delusion had a direct bearing on the provisions of the will. In such cases, the delusion being once proved, and its connection with the will being manifest, there could be no difficulty in setting aside the will. Cases of this description afford little or no assistance towards the solution of the question before us. Again, other cases occurring prior to the case of *Waring* v. *Waring* (4), such as *The Attorney General* v. *Parnther* (5) and *Cartwright* v. *Cartwright* (6), had reference to the effect to be given to a lucid interval at the time of making the will, rather than to the degree of mental unsoundness which would constitute testamentary incapacity. The judgment in the latter case is, however, not unworthy of attention. The case was a remarkable one, from the fact that the will had been made by a person actually confined in a lunatic asylum, and

(1) 6 Rep. 23.
(2) 3 Curt. App. xxx.
(3) 3 Add. 79; Haggard's Report of Judgment, p. 19.
(4) 6 Moo. P. C. 341.
(5) 3 Bro. C. C. 441.
(6) 1 Phillim. 90, 100.

1870

BANKS v. GOODFELLOW.

who was undoubtedly insane both before and after the making of the will; nevertheless it was upheld. Sir William Wynne, the then Judge of the Prerogative Court of Canterbury, in giving judgment, uses language tending strongly to shew that, in his opinion, the rationality of the act done affords an effectual test of the mental capacity of the party doing it. He says (1): "I think the strongest and best proof that can arise as to a lucid interval is that which arises from the act itself: that I look upon as the thing to be first examined, and if it can be proved and established that it is a rational act rationally done, the whole case is proved. What can you do more to establish the act? Because, suppose you are able to shew that the party did that which appears to be a rational act, and it is his own act entirely, nothing is left to presumption in order to prove a lucid interval. Here is a rational act rationally done. In my apprehension, where you are able completely to establish that, the law does not require you to go further, and the citation from Swinburne states it to be so. The manner he has laid it down is (it is in the part (2) in which he treats of what persons may make a will): 'If a lunatic person, or one that is beside himself at some times, but not continually, make his testament, and it is not known whether the same were made while he was of sound mind and memory or no, then, in case the testament be so conceived as thereby no argument of phrensy or folly can be gathered, it is to be presumed that the same was made during the time of his calm and clear intermissions; and so the testament shall be adjudged good, yea, although it cannot be proved that the testator useth to have any clear and quiet intermissions at all, yet, nevertheless, I suppose that if the testament be wisely and orderly framed, the same ought to be accepted for a lawful testament.' Unquestionably," Sir William Wynne continues, "there must be a complete and absolute proof the party who had so framed it did it without any assistance. If the fact be so that he has done as rational an act as can be, without any assistance from another person, what there is more to be proved, I don't know, unless the gentlemen could prove by any authority, or law, what the length of the lucid interval is to be, whether an hour, a day, or a month. I know no such law as that. All that is wanting is, that

(1) 1 Phillips, at p. 100. (2) Swinburne, part ii. s. 3.

it should be of sufficient length to do the rational act intended. I look upon it, if you are able to establish the fact that the act done is perfectly proper, and that the party who is alleged to have done it was free from the disorder at the time, that is completely sufficient."

Without going to the length of adopting to its full extent what is here said as to the effect of the rational character of the will, or at all saying that effect can be given to the rationality of the disposition beyond that which is due to it as evidence of the sanity of the testator, we advert to this case and the judgment of Sir William Wynne as shewing that a more indulgent view of the effect of insanity, as affecting testamentary incapacity, was then taken than has latterly prevailed.

We come now to the case of *Waring* v. *Waring* (1) (since followed by that of *Smith* v. *Tebbitt* (2)) in which the doctrine now contended for on behalf of the plaintiff was for the first time laid down. It may be shortly stated thus: To constitute testamentary capacity, soundness of mind is indispensably necessary. But the mind, though it has various faculties, is one and indivisible. If it is disordered in any one of these faculties, if it labours under any delusion arising from such disorder, though its other faculties and functions may remain undisturbed, it cannot be said to be sound. Such a mind is unsound, and testamentary incapacity is the necessary consequence.

As has already been observed, neither in *Waring* v. *Waring* (1) nor in *Smith* v. *Tebbitt* (2), was the doctrine thus laid down in any degree necessary to the decision. Both these were cases of general, not of partial, insanity; in both the delusions were multifarious, and of the wildest and most irrational character, abundantly indicating that the mind was diseased throughout. In both there was an insane suspicion or dislike of persons who should have been objects of affection; and, what is still more important, in both it was palpable that the delusions must have influenced the testamentary disposition impugned. In both these cases, therefore, there existed ample grounds for setting aside the will without resorting to the doctrine in question. Unable to concur in it, we have felt at liberty to consider for ourselves the principle properly appli-

(1) 6 Moo. P. C. 341. (2) Law Rep. 1 P. & M. 398.

1870

BANKS v. GOODFELLOW.

cable to such a case as the present. We do not think it necessary to consider the position assumed in *Waring* v. *Waring* (1), that the mind is one and indivisible, or to discuss the subject as matter of metaphysical or psychological inquiry. It is not given to man to fathom the mystery of the human intelligence, or to ascertain the constitution of our sentient and intellectual being. But whatever may be its essence, every one must be conscious that the faculties and functions of the mind are various and distinct, as are the powers and functions of our physical organization. The senses, the instincts, the affections, the passions, the moral qualities, the will, perception, thought, reason, imagination, memory, are so many distinct faculties or functions of the mind. The pathology of mental disease and the experience of insanity in its various forms teach us that while, on the one hand, all the faculties, moral and intellectual, may be involved in one common ruin, as in the case of the raving maniac, in other instances one or more only of these faculties or functions may be disordered, while the rest are left unimpaired and undisturbed;—that while the mind may be overpowered by delusions which utterly demoralize it and unfit it for the perception of the true nature of surrounding things, or for the discharge of the common obligations of life, there often are, on the other hand, delusions, which, though the offspring of mental disease and so far constituting insanity, yet leave the individual in all other respects rational, and capable of transacting the ordinary affairs and fulfilling the duties and obligations incidental to the various relations of life. No doubt when delusions exist which have no foundation in reality, and spring only from a diseased and morbid condition of the mind, to that extent the mind must necessarily be taken to be unsound; just as the body, if any of its parts or functions is affected by local disease, may be said to be unsound, though all its other members may be healthy, and their powers or functions unimpaired. But the question still remains, whether such partial unsoundness of the mind, if it leaves the affections, the moral sense, and the general power of the understanding unaffected, and is wholly unconnected with the testamentary disposition, should have the effect of taking away the testamentary capacity.

(1) 6 Moo. P. C. 341.

We readily concede that where a delusion has had, as in the case of *Dew* v. *Clark* (1), or is calculated to have had, an influence on the testamentary disposition, it must be held to be fatal to its validity. Thus if, as occurs in a common form of monomania, a man is under a delusion that he is the object of persecution or attack, and makes a will in which he excludes a child for whom he ought to have provided; though he may not have adverted to that child as one of his supposed enemies, it would be but reasonable to infer that the insane condition had influenced him in the disposal of his property. But, in the case we are dealing with, the delusion must be taken neither to have had any influence on the provisions of the will, nor to have been capable of having any; and the question is, whether a delusion, thus wholly innocuous in its results as regards the disposition of the will, is to be held to have the effect of destroying the capacity to make one.

The state of our own authorities being such as we have shown, we have turned to the jurisprudence of other countries, as on a matter of common juridical interest, to see whether we could there find any assistance towards the solution of the question. We have, however, derived but little advantage from the inquiry. The Roman law, the great storehouse of juridical science, is as vague and general on the subject as our own. The madman (furiosus), and the person of defective intelligence (mente captus), are declared incapable of making a testament; but as to what shall constitute madness or defectiveness of intelligence, sufficient to prevent the exercise of the testamentary right, the authorities are silent. The continental codes are equally general in their terms, simply providing, either that persons must be of sound mind to make a will, or that persons of unsound mind shall be disabled from doing so. The older writers appear not to have been alive to the distinction between total and partial unsoundness as affecting testamentary capacity. In recent times, however, the question has been mooted by eminent and distinguished jurists, but unfortunately with a marked discordance of opinion. M. Troplong, in his well-known work, "Le Droit Civil Expliqué" (2), and M. Sacase, in a treatise

(1) 3 Add. 79, and Haggard's Report of the Judgment.

(2) Commentaire sur les donations entre vifs et testaments, tom. ii. §§ 451–7.

1870

BANKS v. GOODFELLOW.

entitled "La Folie considérée dans ses rapports avec la Capacité Civile" (1), have adopted the doctrine of the unity and indivisibility of the mind, and the consequent unsoundness of the whole if insane delusion anywhere exist. Writers equally entitled to respect have maintained the contrary view. Legrand du Saulle, in a very able work, entitled "La Folie devant les tribunaux" (2), contends that "hallucinations are not a sufficient obstacle to the power of making a will, if they have exercised no influence on the conduct of the testator, have not altered his natural affections, or prevented the fulfilment of his social and domestic duties; while, on the other hand, the will of a person affected by insane delusion ought not to be admitted if he has disinherited his family without cause, or looked on his relations as enemies, or accused them of seeking to poison him, or the like. In all such cases, where the delusion exercises a fatal influence on the acts of the person affected, the condition of the testamentary power fails: the will of the party is no longer under the guidance of reason, it becomes the creature of the insane delusion." M. Demolombe, in his great work, the "Cours de Code Napoleon" (3), M. Castlenau, in his treatise, "Sur l'Interdiction des Aliénés," and Hoffbauer, in his remarkable work on Medical Jurisprudence relating to Insanity, have maintained the doctrine that monomania, or partial insanity, not affecting the testamentary disposition, does not take away the testamentary capacity. Mazzoni, in a recent work, entitled "Istituzioni di diritto civile Italiano" (4), lays it down that "monomania is not an unsoundness of mind which absolutely and necessarily takes away testamentary capacity, as the monomaniac may have the perfect exercise of his faculties in respect of all subjects beyond the sphere of the partial derangement."

None of these writers, however, have gone very deeply into the subject, or considered it with reference to the principles on which mental alienation should be held to form a ground for taking away testamentary capacity. The older jurists were content to say that an insane person was incapable of making a testament, because he has no mind, "quia mente caret," as it is said in the

(1) P. 16.
(2) P. 146.
(3) Traité des donations entre vifs et testaments, liv. iii. tit. 2, ch. ii. § 339. Vol. i. p. 369.
(4) Liv. iii. tit. 2, s. 3.

Institutes (1); or because he could not have a will, and therefore was incapable of declaring his ultimate will as to the disposal of his property—positions obviously unsatisfactory when the fact becomes recognized that a man may labour under harmless delusions, which leave the other faculties of his mind unaffected, and leave him free to make a disposition of his property uninfluenced by their existence. In our day the doctrine has sprung up of the unity and indivisibility of the mind, but the ground on which insanity should cause incapacity appears to have been overlooked in the reasoning on which it is founded. It is important to recall it.

The law of every civilized people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is thus enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection. Independently of any law, a man on the point of leaving the world would naturally distribute among his children or nearest relatives the property which he possessed. The same motives will influence him in the exercise of the right of disposal when secured to him by law. Hence arises a reasonable and well warranted expectation on the part of a man's kindred surviving him, that on his death his effects shall become theirs, instead of being given to strangers. To disappoint the expectation thus created and to disregard the claims of kindred to the inheritance is to shock the common sentiments of mankind, and to violate what all men concur in deeming an obligation of the moral law. It cannot be supposed that, in giving the power of testamentary disposition, the law has been framed in disregard of these considerations. On the contrary, had they stood alone, it is probable that the power of testamentary disposition would have been withheld, and that the distribution of property after the owner's death would have been uniformly regulated by the law itself. But

(1) Instit. lib. II. tit. 12, § 1.

1870

BANKS v. GOODFELLOW.

there are other considerations which turn the scale in favour of the testamentary power. Among those, who, as a man's nearest relatives, would be entitled to share the fortune he leaves behind him, some may be better provided for than others; some may be more deserving than others; some from age, or sex, or physical infirmity, may stand in greater need of assistance. Friendship and tried attachment, or faithful service, may have claims that ought not to be disregarded. In the power of rewarding dutiful and meritorious conduct, paternal authority finds a useful auxiliary; age secures the respect and attentions which are one of its chief consolations. As was truly said by Chancellor Kent, in *Van Alst* v. *Hunter* (1), "It is one of the painful consequences of extreme old age that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property is one of the most efficient means which he has in protracted life to command the attentions due to his infirmities." For these reasons the power of disposing of property in anticipation of death has ever been regarded as one of the most valuable of the rights incidental to property, while there can be no doubt that it operates as a useful incentive to industry in the acquisition of wealth, and to thrift and frugality in the enjoyment of it. The law of every country has therefore conceded to the owner of property the right of disposing by will either of the whole, or, at all events, of a portion, of that which he possesses. The Roman law, and that of the Continental nations which have followed it, have secured to the relations of a deceased person in the ascending and descending line a fixed portion of the inheritance. The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice, or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law.

(1) 5 Johnson N. Y. Ch. Rep. at p. 159.

It is unnecessary to consider whether the principle of the foreign law or that of our own is the wiser. It is obvious, in either case, that to the due exercise of a power thus involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition. It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.

Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand. But what if the mind, though possessing sufficient power, undisturbed by frenzy or delusion, to take into account all the considerations necessary to the proper making of a will, should be subject to some delusion, but such delusion neither exercises nor is calculated to exercise any influence on the particular disposition, and a rational and proper will is the result; ought we, in such case, to deny to the testator the capacity to dispose of his property by will?

It must be borne in mind that the absolute and uncontrolled power of testamentary disposition conceded by the law is founded on the assumption that a rational will is a better disposition than any that can be made by the law itself. If therefore, though mental disease may exist, it presents itself in such a degree and form as not to interfere with the capacity to make a rational dis-

1870

BANES v. GOODFELLOW.

posal of property, why, it may be asked, should it be held to take away the right? It cannot be the object of the legislator to aggravate an affliction in itself so great by the deprivation of a right the value of which is universally felt and acknowledged. If it be conceded, as we think it must be, that the only legitimate or rational ground for denying testamentary capacity to persons of unsound mind is the inability to take into account and give due effect to the considerations which ought to be present to the mind of a testator in making his will, and to influence his decision as to the disposal of his property, it follows that a degree or form of unsoundness which neither disturbs the exercise of the faculties necessary for such an act, nor is capable of influencing the result, ought not to take away the power of making a will, or place a person so circumstanced in a less advantageous position than others with regard to this right.

It may be here not unimportant to advert to the law relating to unsoundness of mind arising from another cause—namely, from want of intelligence occasioned by defective organization, or by supervening physical infirmity or the decay of advancing age, as distinguished from mental derangement, such defect of intelligence being equally a cause of incapacity. In these cases it is admitted on all hands that though the mental power may be reduced below the ordinary standard, yet if there be sufficient intelligence to understand and appreciate the testamentary act in its different bearings, the power to make a will remains. It is enough if, to use the words of Sir Edward Williams, in his work on Executors, "the mental faculties retain sufficient strength fully to comprehend the testamentary act about to be done." (1) "Non sani tantum," says Voet in his Commentary on the Pandects (2), founding himself on the language of the Code, Book 6, tit. 23, l. 15, "sed et in agone mortis positi, seminece ac balbutiente linguâ voluntatem promentes, recte testamenta condunt, si modo mente adhuc valeant."

This part of the law has been extremely well treated in more than one case in the American Courts.

In the case of *Harrison* v. *Rowan* (3), in the United States

(1) Williams on Executors, 6th ed. vol. 1. p. 37, n. x.

(2) Lib. 28, tit. i. s. 36.

(3) 3 Washington, at p. 585; referred to in *Sloan* v. *Maxwell*, 2 H. W. Green (New Jersey Ch. Rep.) at p. 570.

Circuit Court for the district of New Jersey, the law was thus laid down by the presiding judge: "As to the testator's capacity, he must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them. It is not necessary that he should view his will with the eye of a lawyer, and comprehend its provisions in their legal form. It is sufficient if he has such a mind and memory as will enable him to understand the elements of which it is composed, and the disposition of his property in its simple forms. In deciding upon the capacity of the testator to make his will, it is the soundness of the mind, and not the particular state of the bodily health, that is to be attended to; the latter may be in a state of extreme imbecility, and yet he may possess sufficient understanding to direct how his property shall be disposed of; his capacity may be perfect to dispose of his property by will, and yet very inadequate to the management of other business, as, for instance, to make contracts for the purchase or sale of property. For, most men, at different periods of their lives, have meditated upon the subject of the disposition of their property by will, and when called upon to have their intentions committed to writing, they find much less difficulty in declaring their intentions than they could in comprehending business in some measure new."

In the case of *Den* v. *Vancleve* (1) the law was thus stated: "By the terms 'a sound and disposing mind and memory' it has not been understood that a testator must possess these qualities of the mind in the highest degree; otherwise, very few could make testaments at all; neither has it been understood that he must possess them in as great a degree as he may have formerly done; for even this would disable most men in the decline of life; the mind may have been in some degree debilitated, the memory may have become in some degree enfeebled; and yet there may be enough left clearly to discern and discreetly to judge, of all those things, and all those circumstances, which enter into the nature of a rational,

(1) 2 Southard, at p. 660.

1870

BANKS v. GOODFELLOW.

fair, and just testament. But if they have so far failed as that these cannot be discerned and judged of, then he cannot be said to be of sound and disposing mind and memory."

In the subsequent case of *Stevens* v. *Vancleve* (1) it is said: "The testator must, in the language of the law, be possessed of sound and disposing mind and memory. He must have memory; a man in whom the faculty is totally extinguished cannot be said to possess understanding to any degree whatever, or for any purpose. But his memory may be very imperfect; it may be greatly impaired by age or disease; he may not be able at all times to recollect the names, the persons, or the families of those with whom he had been intimately acquainted; may at times ask idle questions, and repeat those which had before been asked and answered, and yet his understanding may be sufficiently sound for many of the ordinary transactions of life. He may not have sufficient strength of memory and vigour of intellect to make and to digest all the parts of a contract, and yet be competent to direct the distribution of his property by will. This is a subject which he may possibly have often thought of, and there is probably no person who has not arranged such a disposition in his mind before he committed it to writing. The question is not so much what was the degree of memory possessed by the testator? as this: Had he a disposing memory? was he capable of recollecting the property he was about to bequeath; the manner of distributing it; and the objects of his bounty? To sum up the whole in the most simple and intelligible form, were his mind and memory sufficiently sound to enable him to know and to understand the business in which he was engaged at the time he executed his will?"

This view of the law is fully adopted by the Court in the case of *Sloan* v. *Maxwell* (2), and is there stated to have been approved by Chancellor Vroom in a case as to the will of Tace Wallace, which, however, is not reported. It appears to have had the sanction of Chancellor Kent, in the case of *Van Alst* v. *Hunter* (3), already referred to.

In a case of *Harwood* v. *Baker* (4), before the Judicial Com-

(1) 4 Washington, at p. 267.
(2) 2 H. W. Green (N. J. Chan. R.) 563.
(3) 5 Johnson N. Y. Ch. Rep. at p. 159.
(4) 3 Moo. P. C. 282.

mittee of the Privy Council, in which case a will had been executed by a testator on his deathbed, in favour of a second wife, to the exclusion of the other members of his family, he being in a state of weakened and impaired capacity from disease producing torpor of the brain, and rendering his mind incapable of exertion unless roused, Erskine, J., delivered the judgment of the Court in these terms: (1) "Their Lordships are of opinion that, in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his will he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one; and more especially, when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration. And, therefore, the question which their Lordships propose to decide in this case is, not whether Mr. Baker knew, when he executed this will, that he was giving all his property to his wife, and excluding all his other relations from any share in it, but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property. If he had not the capacity required, the propriety of the disposition made by the will is a matter of no importance. If he had it, the injustice of the exclusion would not affect the validity of the disposition, though the justice or injustice of the disposition might cast down some light upon the question as to his capacity."

From this language it is to be inferred that the standard of capacity in cases of impaired mental power is, to use the words of the judgment, the capacity on the part of the testator to comprehend the extent of the property to be disposed of, and the nature of the claims of those he is excluding. Why should not this standard be also applicable to mental unsoundness produced by mental disease?

It may be said that the analogy between the two cases is imper-

(1) 3 Moo. P. C. at p. 291.

1870

BANKS v. GOODFELLOW.

fect; that there is an essential difference between unsoundness of mind arising from congenital defect, or supervening infirmity, and the perversion of thought and feeling produced by mental disease, the latter being far more likely to give rise to an inofficious will than the mere deficiency of mental power. This is, no doubt, true, but it becomes immaterial on the hypothesis that the disorder of the mind has left the faculties, on which the proper exercise of the testamentary power depends, unaffected, and that a rational will, uninfluenced by the mental disorder, has been the result.

It is said, indeed, by those who insist that any degree of unsoundness should suffice to take away testamentary capacity, that where insane delusion has shewn itself, it is always possible, and indeed may be assumed to be probable, that a greater degree of mental unsoundness exists than has actually become manifest. But this view, which is by no means universally admitted, is unsupported by proof, and must be looked upon as matter of speculative opinion. It seems unreasonable to deny testamentary capacity on the speculative possibility of unsoundness which has failed to display itself, and which, if existing in a latent and undiscovered form, would be little likely to have any influence on the disposition of the will. No doubt, where the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. Where insane delusion has once been shewn to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes additionally strong where the will is, to use the term of the civilians, an inofficious one, that is to say, one in which natural affection and the claims of near relationship have been disregarded. But where in the result a jury are satisfied that the delusion has not affected the general faculties of the mind, and can have had no effect upon the will, we see no sufficient reason why the testator should be held to have lost his right to make a will, or why a will made under such circumstances should not be upheld. Such an inquiry

may involve, it is true, considerable difficulty, and require much nicety of discrimination, but we see no reason to think that it is beyond the power of judicial investigation and decision, or may not be disposed of by a jury directed and guided by a judge. In the case before us two delusions disturbed the mind of the testator, the one that he was pursued by spirits, the other that a man long since dead came personally to molest him. Neither of these delusions—the dead man not having been in any way connected with him—had, or could have had any influence upon him in disposing of his property. The will, though in one sense an idle one, inasmuch as the object of his bounty was his heir at law, and therefore would have taken the property without its being devised to her, was yet rational in this, that it was made in favour of a niece, who lived with him, and who was the object of his affection and regard. And we must take it on the finding of the jury that irrespectively of the question of these dormant delusions, the testator was in possession of his faculties when the will was executed.

Under these circumstances, we see no ground for holding the will to be invalid. If, indeed, it had been possible to connect the dispositions of the will with the delusions of the testator, the form in which the case was left to the jury might have been open to exception. It may be, as was contended on the part of the plaintiff, that in a case of unsoundness, founded on delusion, but which delusion was not manifested at the time of making the will, it is a question for the jury whether the delusion was not latent in the mind of the testator. But, then, for the reasons we have given in the course of this judgment, we are of opinion that a jury should be told, in such a case, that the existence of a delusion, compatible with the retention of the general powers and faculties of the mind, will not be sufficient to overthrow the will, unless it were such as was calculated to influence the testator in making it.

This, in effect, disposes of the question of misdirection. As, for the reasons we have given, we are of opinion that if the testator was, at the time of making the will, of capacity to make a will as defined by the learned judge, the existence of mental disease, if latent, so as to leave him free from the consciousness and influence of delusion, there having been a total absence of all connection between the delusion and the will, would not overthrow the will,

1870

BANKS v. GOODFELLOW.

it follows that there can have been, practically speaking, no misdirection in not leaving the question of latent delusion to the jury. Where delusions are of such a nature as is calculated to influence the testator in making the particular disposition, as was the case in *Waring* v. *Waring* (1), and in *Smith* v. *Tebbitt* (2), a jury would not in general be justified in coming to the conclusion that the delusion, still existing, was latent at the time, so as to leave the testator free from any influence arising from it; but in the present case the disposition was quite unconnected with the delusions, and consequently there is no reason to suppose that the omission to call the attention of the jury to this specifically can have affected the verdict.

Looking to the evidence given on the trial, and to the verdict of the jury, it appears to us that if this case were submitted to another jury, whatever they might find as to the existence of latent delusion, their decision must be in favour of the will as to the absence of all connection between the delusions and the disposition made by the testator. It would, consequently, be worse than useless to put the parties to the expense of a new trial, when in our judgment the only proper or possible result must be a second verdict establishing the will.

Rule discharged.

Attorney for plaintiff: *J. G. Waugh.*
Attorneys for defendant: *Nethersole & Speechley.*

(1) 6 Moo. P. C. 341. (2) Law Rep. 1 P. & M. 398.

1870
June 10.

VELEY *v.* PERTWEE AND ANOTHER.

Churchwardens, Liability of—Fee of Registrar—Archdeacon's Visitation.

The liability of churchwardens to pay the fee of the registrar to an archdeacon is not personal, but is contingent upon their possessing funds out of which the fees may be legally paid.

Therefore, where churchwardens had no funds in their hands for the repairs of the church, or for any other expense incident to their office, except by voluntary subscriptions, and were without the means of obtaining funds:—

Held, that they were not liable to pay the fee of the registrar due upon a visitation of the archdeacon.

APPEAL from the county court of Essex holden at Chelmsford.

The action was brought for the recovery of 12*s.* 6*d.* for fees due and payable by the defendants to the plaintiff, as registrar of the archdeaconry court of Essex on the visitation of the archdeacon of the archdeaconry, on the 28th of June, 1869, and for services rendered and materials found and provided by the plaintiff to and for the defendants.

At the hearing the following facts were proved and admitted. The plaintiff holds the office of registrar of the archdeaconry court of Essex, in the diocese of Rochester. The defendants are churchwardens of the parish of Boreham, which is within the archdeaconry. The archdeaconry comprehends about 200 parishes in the county of Essex, over the whole of which the archdeacon has jurisdiction as ordinary, and in subordination to him are the following officers—the "official," the "registrar," who is the plaintiff, and holds the office for life by patent dated the 19th of April, 1848, and the "apparitor," who is the summoning officer. The archdeaconry is divided into several districts, or "calls," for which visitations are held. The parish of Boreham is comprehended, with thirty-one others, in the Chelmsford "call." A visitation of the archdeacon was held on the day mentioned in the particulars of demand.

The plaintiff had proved all facts, and also that all necessary acts and things had been done by him in his capacity of registrar to entitle him to a verdict for the fees claimed, under the authority of the case of *Shepherd* v. *Payne*. (1)

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; and 16 C. B. (N. S.) 132; 33 L. J. (C.P.) 158.

1870

VELEY v. PERTWEE.

The *London Gazette* of the 19th of March, 1869, was put in evidence, containing a table of fees established and settled under the authority of 30 & 31 Vict. c. 135. (1)

It was proved on the part of the defendants that previously to

(1) 30 & 31 Vict. c. 135, s. 1:—"From and after the passing of this Act the Archbishop of Canterbury, the Lord Chancellor, and the Archbishop of York, with the assistance of the vicars-general of the said two archbishops, may, from time to time, with the consent of the Lords Commissioners of Her Majesty's Treasury, settle a table or tables of fees and payments to be made to chancellors or vicars-general, registrars, secretaries, and other officers on the consecration of churches, chapels, cemeteries, and burial grounds, on and incidental to the grant of faculties, and on the ordination of deacons and priests, and to the chancellors, or vicars-general, registrars, and other officers of archbishops and bishops, and to archdeacons and their officials, and other officers, on the visitation of such archbishops, and bishops, and archdeacons respectively, which table or tables of fees shall be submitted to Her Majesty's Privy Council, who may disallow the same, or any part thereof; and notice shall be given in the *London Gazette* of such submission to the Privy Council; and if within the space of three months from the time of giving such notice the same shall not be disallowed, such fees or such parts thereof as shall not be disallowed, and none others, shall thenceforward be demanded, taken, or received by such officers and persons, and on such occasions respectively as hereinbefore mentioned; and the provisions of the said recited Act as to the fees therein mentioned, so far as the same may be applicable, shall, except as herein otherwise provided, extend and be applied to the tables of fees to be settled under this Act: Provided always, that nothing in this Act shall extend to render lawful the demand of any fee whatever from any person by whom or for the performance of any duty for which no fee is now by law payable, nor to enable the persons hereinbefore in that behalf authorized to ordain or establish any fee exceeding the fee which for the twenty years next preceding the passing of this Act shall have been usually taken for or in respect of the same matter within the diocese of London: Provided also, that every such table of fees, when allowed by the Privy Council, shall be laid before Parliament within thirty days, if Parliament is then sitting, and if not, then within thirty days after the then next meeting of Parliament."

The *London Gazette* of the 19th of March, 1869, contains a table of the fees settled in pursuance of the above Act:—

"Episcopal or Archidiaconal Visitation.

	s.	d.
Vicar-general, chancellor, archdeacon, or official	2	0
Registrar, or other officer by usage performing the duty	12	6
Apparitor	3	6

The registrar's fee includes the drawing and issuing of the inhibition and of the mandate for the citation of the clergy, the preparation of the visitation books and of the articles of inquiry, and the presentment papers, the attendance at the visitation and attesting the presentments and declarations of the churchwardens, the registering the papers exhibited by the clergy, the tabulating in the registry the copies of the register books of baptisms and burials, and other papers required to be annually transmitted."

the time the visitation was held, and from thence to the trial of this action, the defendants had no funds in their hands as churchwardens, and were without the means of obtaining funds for the necessary repairs of the church, or for defraying any other expenses incident to their office, except so far as they could obtain voluntary subscriptions.

The defendants, however, admitted that they had paid the wages of the parish clerk and sexton out of funds contributed for those specific purposes.

The judge of the county court was of opinion that the plaintiff had established his right to the fees in question, and that they were a personal charge on the churchwardens, and that the circumstance of the defendants being without funds or the means of obtaining the same, as above set forth, did not amount to a defence to such action. He therefore gave judgment for the plaintiff for the amount claimed, but allowed an appeal.

The question for the opinion of the Court was, whether the circumstance that the defendants were without funds, or the means of obtaining the same, as mentioned in the case, amount to a defence to the action of the plaintiff.

June 6, 10. *Wills*, for the defendants. It will be said on behalf of the plaintiff, that there is an implied contract that the churchwardens shall, out of their own money, pay the registrar his fees as for services rendered. (1) It is quite a novel principle that

(1) The following passage from *Shepherd* v. *Payne* (12 C. B. (N. S.) 414, 415; 31 L. J. (C.P.) 297, 298), was read and referred to by counsel on both sides and by the Court, during the argument, as shewing what the nature of the services was for which the fee was demanded:— (9 Jur. N.S. 354)

"The following is the mode in which the business of the court is conducted. Shortly after Easter in every year a process is issued by the registrars, under the seal of the archdeaconry, addressed to all clerks and literate persons, whomsoever in and throughout the archdeaconry, appointing a day for holding the Easter visitation in the parish church of Kelvedon, or occasionally in the neighbouring parish of Witham, and directing them to cite the churchwardens to attend. The process is delivered to the apparitor alone, who issues citations accordingly, which in special cases are personally served, but more frequently sent by the post. Printed articles of inquiry (commonly called "presentment papers") are prepared and forwarded by the registrar to the rural dean of each of the eighteen deaneries. The rural dean arranges a time with the churchwardens of each parish, when he shall inspect

1870

VELEY v. PERTWEE.

a person who is in a manner compelled to serve an office, should be personally liable for fees. There is only one such instance known to the law, and that is the case of a sheriff who has to provide for

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their church; and in his presence, and in their own parish, the churchwardens fill up and sign their presentments ready for delivery at the visitation. At the day appointed for the visitation, and before appearing at the church, the practice is for the churchwardens to attend the registrar at an inn, or other convenient place, where they are furnished by him with printed declarations of office, under the statute 5 & 6 Wm. 4, c. 62, s. 9, which they sign. At the same time they pay the "procurations and synodals," claimed as due from the clergy to the archdeacon, as well as the fees claimed as due from themselves to the officers of the court. At the appointed hour the archdeacon, official, or surrogate, takes his accustomed seat in the church, attended by one of the registrars, and (after divine service) the court is formally opened, and the churchwardens of the several parishes are called over in rotation. The outgoing churchwardens appear, and deliver in their presentment papers, which are inspected by the judge, and delivered by him to the registrar, to be filed. The registrar enters a minute in the visitation book of the appearance of the churchwardens, as well as of any special order as to repairs, or otherwise, which may be made by the court. At the same time the churchwardens elect, who are in the majority of cases the old churchwardens re-chosen, deliver in their declarations of office, which are acknowledged before the judge and filed by the registrar, who also enters a minute of the fact in the visitation book. Another visitation is held shortly after Michaelmas in each year, before the official or his surrogate, the object of which is to ascertain whether the defects presented at the Easter visitation have been amended, and the orders then given obeyed. Process is issued, citations and presentment papers sent out, and the proceedings conducted in the same form as at Easter, except that the facilities of the post office have of late years been made use of to obviate the personal attendance of the churchwardens in those cases in which they are able to make a satisfactory return. The various duties before described occupy a large portion of time, and occasion a very considerable outlay in travelling and other expenses, clerk salaries, printing, postage, and sundries. The registrars have no remuneration for such services, except certain fees called visitation fees, which they claim as follows: at the Easter visitation, for process and schedule, citation and service, act on appearance of outgoing churchwardens, articles of inquiry, presentment and filing, return of churchwardens elect, and filing, act on appearance of churchwardens elect, declaration of office and filing, the sum of 7*s.* 6*d.* in the whole; out of which the sum of 2*s.* is due to the official, and 1*s.* to the apparitor. And at the Michaelmas visitation, for process and schedule, citation and service, act on appearance of churchwardens, articles of inquiry, presentment and filing, the sum of 4*s.* 6*d.* in the whole; out of which 1*s.* is due to the official, and 1*s.* to the apparitor. The churchwardens are not liable to the official or to the apparitor for payment of any fees which they do not themselves actually receive."

the expense of holding the assizes. *Shepherd* v. *Payne* (1), does not support the contention of the plaintiff; the Court were careful to avoid giving any opinion on the question involved in this case. There is no direct authority on the point, but there are several dicta in works relating to ecclesiastical law, shewing that the liability of churchwardens is contingent upon their possessing funds. In Lyndwood's Provinciale, lib. 1, tit. 10, p. 53, the following passage occurs: "Sed nunquid guardiani ecclesiæ ad hujusmodi reparationem faciendam et alias ad bona ecclesiæ disponenda electi, possunt per pœnam hujusmodi, sc. excommunicationis vel suspensionis aut per pœnam aliam, compelli ad reparationem de quâ hic dicit. œstimo quod si sufficienter habere possunt unde fiat reparatio hujusmodi, tunc si circa hoc negligentes extiterint, possunt per censuram ad hoc compelli." In Stephens' Laws relating to the Clergy, vol. i. p. 360, it is stated that "It is now established that there cannot be a rate made to reimburse churchwardens, because they are not obliged to expend any money out of their own pockets." This passage is supported by the judgments and especially by that of Chapple, J., in *Dawson* v. *Wilkinson.* (2) To the same effect is *Millar* v. *Palmer.* (3) It is there laid down that in order to justify criminal proceedings against churchwardens for neglecting to repair their parish church, it must be shewn that they have been guilty of personal and wilful neglect, and Sir H. Jenner says (3): "The churchwardens were not bound to expend their own money, nor to undertake the repairs [of the church] until the funds were provided." It will also be contended that as the table of fees issued by the archbishops and the Lord Chancellor, and published in the *London Gazette* of the 19th of March, 1869, pursuant to 30 & 31 Vict. c. 135, is sanctioned by parliament, it in effect casts a statutory obligation on the defendants personally. This is a fallacy, for it is provided that the Act shall not extend to render lawful the demand of any fee whatever from any person by whom no fee was at the passing of the Act by law payable. At the passing of the Act, a churchwarden without funds was not liable to the payment of fees, and the proviso prevents

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; 16 C. B. (N. S.) 132; 33 L. J. (C.P.) 158.

(2) Cas. t. Hardw. 381, 382.

(3) 1 Curt. 540, 555.

1870

VELEY v. PERTWEE.

any fresh liability from being thrown upon them. The table of fees shews that the services in respect of which the fee is claimed were rendered not to the churchwardens, but to the whole parish. An action on a quantum meruit, therefore, will not lie against the defendants.

Sir J. D. Coleridge, S.G. (*Thesiger* with him), for the plaintiff. The question is whether the registrar of an archdeacon can maintain an action for the recovery of his fee. It follows from the principle laid down in *Shepherd* v. *Payne* (1), that the liability of a churchwarden is personal and is not dependent upon the contingency of his possessing funds. That case is conclusive and binding on this Court. This is an action to recover upon a quantum meruit a reasonable sum for services rendered: the services rendered form a valid consideration for the implied promise to pay. In *Furnivall* v. *Coombes* (2) churchwardens covenanted to pay for repairs to be done to their parish church by certain instalments; the deed contained a proviso that they should not be personally liable, but it was held that the covenant was personal, and the proviso being repugnant thereto was void. This is a strong authority for shewing that the churchwardens are liable in the present case.

[COCKBURN, C.J. In that case the churchwardens by an express covenant made themselves personally liable, and that liability could not be destroyed by an inconsistent proviso.]

In *Ballard* v. *Gerard* (3) the registrar in an ecclesiastical court having libelled for 4*s.* 6*d.* for his fees, and proceeded to excommunication, the defendant moved for a prohibition, which was granted; the Court saying that the (Ecclesiastical) Court has no power to compel the party to pay fees to their officers, but they must bring quantum meruit, or if the office be a freehold they may bring an assize, for the denial of just fees is a disseisin.

[LUSH, J. That case decides nothing: if the liability was founded on a contract, it was of common law cognizance.]

If it were not a personal contract by the churchwarden, but a contract to pay out of the rate, the remedy would be by mandamus: *Bogg* v. *Pearse*. (4) But it is clear that this cannot be so, because

(1) 16 C. B. (N. S.) 132; 33 L. J. (C.P.) 158.
(2) 5 M. & G. 736.
(3) 1 Salk. 333; Cas. t. Holt, 596.
(4) 10 C. B. 534; 20 L. J. (C.P.) 99.

all the instances in the books appear to contemplate that the proper remedy is by an action for the fees.

Wills was heard in reply.

COCKBURN, C.J. I am of opinion that our judgment must be for the defendants. The question is, whether, upon the visitation of the archdeacon a fee payable to the registrar of that officer is one which the churchwardens of a parish, included in the visitation, are liable to pay out of their own funds, they having no funds arising from church rates. We must accept the decision of the Court of Common Pleas, affirmed in the Exchequer Chamber in *Shepherd* v. *Payne* (1), as binding on us, as far as it goes. It was there held that the fee was a legal fee, and an action of contract would lie to recover it, but the Court of Common Pleas expressly avoided saying that such an action would lie if it had appeared that the churchwardens were without funds to satisfy the claim. That question arises in the present case and is an open one, not having been decided in *Shepherd* v. *Payne* (1), either in the Court of Common Pleas or in the Exchequer Chamber. According to common right a man who is bound to perform the duties of an office, and is liable to the expenses incidental to that office, is not bound to pay out of his own pocket the fees of officers for the performance of duties not connected with that office. Although an action of contract can be maintained for the recovery of customary fees, the question here is whether the contract to pay them is an absolute or a conditional contract. I think the liability of the churchwardens to pay these fees is contingent upon there being a fund out of which the payment can be made. The decision of the Common Pleas in *Shepherd* v. *Payne* (1), which was adopted by the Exchequer Chamber, does certainly appear to proceed upon the assumption that services are rendered to the churchwardens, from which an absolute contract to pay is to be implied. It has been said that it is the duty of the churchwardens to answer a variety of questions and to make certain presentments, and that this duty would be much facilitated by the questions being prepared for them by the registrar. This may be so to a small

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; 10 C. B. (N. S.) 132; 33 L. J. (C.P.) 158.

1870

VELEY v. PERTWEE.

extent, but the advantage to the churchwardens is of so limited a character that no contract to pay absolutely can be inferred from it. The registrar is the officer of the archdeacon. He has to make inquiries, which are preparatory to the visitation, more for the assistance and guidance of the archdeacon than for that of the churchwardens. The questions would have to be put to the churchwardens personally, and their answers would also be given personally; it is more convenient to have this done in writing, but this is rather for the convenience of the archdeacon's court than for that of the churchwardens. The true ground on which this fee is payable is that, though the registrar is the officer of the archdeacon, yet the system of visitations is essential to the interests of each parish included in the archidiaconal visitation; and as such fees have been paid from time immemorial to the registrars, the churchwardens, as the custodians of the church fund, ought to pay it. That is a very different liability from an absolute liability to pay out of the churchwardens' own pocket. I have, therefore, come to the conclusion that the liability affects the parish, and not the churchwardens personally.

This view is strengthened by what has been done by the legislature since the decision of *Shepherd* v. *Payne*. (1) By 30 & 31 Vict. c. 135, which is an Act for the establishment of a table of fees to be taken amongst other things, on visitations, the Archbishop of Canterbury, the Lord Chancellor, and the Archbishop of York, with the assistance of their vicars-general, are authorized, with the consent of the Lords of the Treasury, to settle a table of the fees and payments to be made to, amongst other persons, archdeacons and their officials, on the visitation of archbishops, bishops, and archdeacons respectively, and these fees, if not disallowed according to the Act, are to be taken by the archdeacons and their officials. By the table of fees so settled, the fee to be taken by the registrar of the archdeacon on a visitation is fixed at 12*s.* 6*d.* (2), and it is in respect of this fee that the present action is brought. To this table of fees is annexed an exposition of what the duties are for which the fee is payable; and in the third paragraph of the statement annexed to the table there comes this provision: "The

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; 16 C. B. (N. S.) 132; 33 L. J. (C.P.) 158. (2) See note, ante, p. 574.

1870

VELEY v. PERTWEE.

registrar's fee includes the drawing and issuing of the inhibition and of the mandate for the citation of the clergy, the preparation of the visitation books and of the articles of inquiry, and the presentment papers, the attendance at the visitation and attesting the presentments and declarations of the churchwardens, the registering the papers exhibited by the clergy, the tabulating in the registry the copies of the register books of baptisms and burials, and other papers required to be annually transmitted." It is quite plain that the registrar's fee is by that table declared to be payable in respect of various duties with which the churchwardens have nothing to do, and which therefore, when discharged by the registrar, cannot in any way be considered as duties done by him in the discharge of duties to be done by churchwardens. I take the table as a parliamentary exposition of the matters in respect of which the customary fee is to be paid to the registrar; if so, it shews that the fee is payable in respect of duties performed by the registrar, of which the parish has the benefit, but from which the churchwardens can derive no advantage; the argument, therefore, that the fee is payable in respect of services rendered fails.

There is another view of the matter: The fee of 12*s.* 6*d.* is founded upon the legislative provision contained in 30 & 31 Vict. c. 135. Since the passing of that Act no other fee can be claimed. Can it be said that the Act imposes a personal liability upon the churchwardens, when we find that the greater part of the duties to be performed by the registrar are duties with which the churchwardens have nothing to do? I think that the legislature had in view not a personal but a parochial liability. If we look, then, at what has been done since the decision of *Shepherd* v. *Payne* (1), it is quite plain that there is no personal liability of the churchwardens.

It is to me a matter of great regret that the registrar should lose his fees; for though church rates are no longer compulsory, and inquiries into the state of the fabric of the church are not perhaps of the same importance as formerly, yet many of the inquiries may still be of great importance, and it is only right that the registrar, whose assistance is essential to the carrying on the visita-

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; 16 C. B. (N. S.) 132; 33 L. J. (C.P.) 158. 9 Jur. N. S. 354. 10 Jur. N. S. 541.

1870

VELEY v. PERTWEE.

tion, should be properly paid. That, however, is a question for the legislature, and it is for them to effect a remedy. I am of opinion, however, that the liability of the churchwardens to pay the fee is a contingent liability, and that there is no absolute contract to pay out of their own pocket. Our judgment must, therefore, be for the defendants.

MELLOR, J. I am also of opinion that our judgment must be for the defendants. The question is this: Are churchwardens, who have no means of obtaining from the parishioners funds with which to pay the registrar's fee, liable to pay it out of their own pocket? It has been argued that the question is concluded by *Shepherd* v. *Payne*. (1) I agree that we should be bound by that case if this question was decided by it, but the effect of the judgment was that, if a churchwarden had funds in his hands, an action might be maintained against him by the registrar for his customary fee. It was assumed that the churchwardens had funds. The great controversy was whether the fee was reasonable; and Willes, J., in his judgment in the Common Pleas, deals chiefly with that question. But, "as to the persons called upon to pay," Willes, J., says (2), "when we consider the period at which the fees must have been introduced, and the nature of the office of churchwarden, we can feel no surprise at finding that the burden was imposed, in the first instance, upon those functionaries. The churchwardens represent the parish in respect of the custody of its property and the care of the fabric of the church, and they are bound to make presentments inter alia respecting the state of the fabric of the church to the archdeacon, who is oculus episcopi at his periodical visitations. We are not at liberty to assume the function of legislators, or to take into account the changes which diversity of opinion brought about. What we are principally to consider is, whether the fees could have a lawful origin. The visitation of the archdeacon must for this purpose be considered for the benefit of the parish at large, and amongst others, but only amongst others, for the benefit of the churchwardens them-

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; 16 C. B. (N. S.) 132; 33 L. J. (C.P.) 158.

(2) 12 C. B. (N. S.) at p. 434; 31 L. J. (C.P.), at p. 305.

selves, the performance of whose duties is facilitated by the services of the registrars. It was not unreasonable that those who might receive the benefit should share in the expense of the visitation; and it is in accordance with the history of like visitations, that the expenses should be borne by those who are visited." He then adds: "It is not alleged or shewn that the churchwardens are without funds or the means of reimbursing themselves. Even if they were in such a condition, it does not follow that they could evade the burden; but upon that we are not called upon for an opinion." It is clear that my Brother Willes considered the archdeacon's visitation was for the benefit of the parish at large, and only amongst others for the benefit of the churchwardens, and the judgment is founded on the assumption that the churchwardens had funds with which to pay the fees. The question, therefore, raised in this case is not concluded by *Shepherd* v. *Payne*. (1)

It has been argued that the churchwardens are liable to the registrar, on the ground that something has been done for their benefit by the registrar. But the services rendered are for the benefit of the parish, and nothing is done by the registrar for the churchwardens personally. There is, therefore, no foundation for any claim against them personally. I think this is made clear by a reference to 30 & 31 Vict. c. 135, and the tables of fees made in pursuance of it. I regret that the registrar should not be paid his fee, but I should be most unwilling to make the churchwardens pay a fee out of their pocket for services rendered to the parish at large.

LUSH, J. I am of the same opinion. The position and liability of a churchwarden are not in any way affected by the recent Act which has made the payment of church rates voluntary. It is remarkable that no authority can be found in support of the proposition that the payments of the registrar's fee is a personal charge on churchwardens. None has been cited. The point to be decided in *Shepherd* v. *Payne* (1) was whether the fee claimed by the archdeacon's registrar was a legal fee, and whether it could be recovered

(1) 12 C. B. (N. S.) 414; 31 L. J. (C.P.) 297; 16 C. B. (N. S.) 132; 33 L. J. (C.P.) 158. 10 Jur. N. S. 354; 10 Jur. N. S. 541.

1870

VELEY v. PERTWEE.

from the churchwardens. The Court decided that it was, but it was assumed thoroughout that case that there were funds out of which the churchwardens could pay. The point we have now to consider was expressly excluded from the judgment of the Court of Common Pleas. What, then, is the ground of the liability of the churchwardens? Does the liability originate in personal services rendered to them or in services rendered to the parish? I think, when we look at the kind of services rendered by the registrar, that these services are rendered to the parish and not to the churchwardens, and that where the churchwardens have funds they are legally liable to pay the fee, but where they have no funds they are not liable.

Judgment for the defendants.

Plaintiff in person.

Attorney for defendants: *W. W. Duffield.*

[IN THE EXCHEQUER CHAMBER.]

June 17.

HARROWER AND OTHERS *v.* HUTCHINSON.

Marine Insurance—Construction of Policy—"Port or Ports of Loading"—Concealment—Deviation.

The plaintiffs, in 1861, effected with the defendant a policy of insurance on bone and bone ash on board a certain vessel, at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres, to port or ports of call and discharge in the United Kingdom. The plaintiffs knew, at that time, that the vessel was going from Buenos Ayres to L., a port in the province, to complete her cargo; but this fact was not communicated to the defendant, and he did not know that L. was a port in the province. L. was a place where a trade in hides, bone, and bone ashes was carried on between that place and Buenos Ayres; but vessels could not clear from L. to Europe, but had to return to Buenos Ayres to obtain a clearance. There was no artificial port, but only a roadstead protected by natural headlands, forming a kind of bay. L. was unknown in 1861 to underwriters as a place of loading; and if underwriters, on a policy as above, had been informed that the vessel was going to load there they would have required a higher premium than the defendant charged. The vessel went from Buenos Ayres to L., but being unable to get cargo, she left that place to return to Buenos Ayres, and was lost on her way thither:—

Held, reversing the judgment of the Queen's Bench, that the non-communication of the fact that the vessel was going to L. to complete her cargo was a concealment of a material fact which vitiated the policy.

Held (by Kelly, C.B., Channell and Pigott, BB., Byles and Brett, JJ.; Martin

and Cleasby, BB., and Willes, J., dissenting), affirming the judgment of the Queen's Bench, that L. was a port of loading within the policy.

Held, also, by Cleasby, B., that the return of the vessel from L. to Buenos Ayres was a deviation.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiffs on a special case. (1)

The action was brought to recover the sum of 18*l.*, part of a sum of 40*l.* on a policy of insurance subscribed by the defendant on bone and bone ash, per *Matanzas*, lost by perils of the sea.

The pleadings and special case are fully set out in the report of the case in the Court below (1); and the facts sufficiently appear in the head-note and judgments.

Feb. 1. *Mellish, Q.C.* (*Cohen* with him), for the defendant.

Milward, Q.C. (*Baylis* with him), for the plaintiffs.

The arguments were the same as in the Court below.

Cur. adv. vult.

June 17. The judgment of Kelly, C.B., Channell and Pigott, BB., Byles and Brett, JJ., was delivered by

KELLY, C.B. In this case, which was error from a judgment of the Court of Queen's Bench, it appeared on a special case stated, that the action was brought against the defendant, as underwriter, by the plaintiffs, Harrower and others, on a marine policy of insurance on the ship *Matanzas*, for a total loss. The defendant, amongst other pleas, pleaded that the ship, without sufficient cause, deviated, &c.; and that certain material facts which the plaintiffs and their agents knew, but of which the defendant was ignorant, were wrongfully concealed, &c. The circumstances stated in the special case were as follows.

The plaintiffs were, in 1861, owners of the British ship *Matanzas*, and the plaintiff Harrower was master. In November, 1861, the *Matanzas*, under the command of Harrower, was at Buenos Ayres, on the look-out for a cargo, Barbour, Barclay, & Co., being agents there for the plaintiffs and the ship. On the 7th of November, 1861, Barbour, Barclay, & Co., made a contract on behalf of the plaintiffs for the purchase of a cargo of bones from

(1) Law Rep. 4 Q. B. 523.

1870

HARROWER v. HUTCHINSON.

the salader or slaughterhouse at a place on the coast called "Laguna de los Padres." On the 13th of November, Harrower wrote to the other plaintiffs, amongst other things, as follows: "I will receive as much as will ballast me here and then proceed down to a place called Laguna de los Padres, which lies in about latitude 38° south, near Cape Corrientes. It is rather open to the east and north-east, but these winds are not dreaded at this season, and having ground tackle for a ship of 600 tons, I apprehend no danger. I merely mention this in case they should claim a heavy premium for insurance. If they should, I would not hesitate to take a small part of the risk myself, but this I will leave to your judgment." On the same day Barbour & Co. wrote to the plaintiffs, Gray and Buchanan, "For your guidance in arranging the insurance we may mention that the Laguna de los Padres is in latitude 38° south; the place is open to the north-east, but in summer the winds from that quarter are usually moderate. The anchorage is very good, and there are two vessels from 250 to 300 tons trading regularly between it and this place. We are informed that they anchor usually in 3½ fathoms, which seems to indicate that the swell is not very heavy. The port may be new to your underwriters, and on this account they may be disposed to ask a rather high premium. If it should be so, you might find it suitable only to cover part of the vessel and cargo during her stay there, effecting insurance on the remainder as soon as she sailed."

The plaintiffs Gray and Buchanan, having received these letters in Glasgow, applied to North, Ewing, & Co., brokers in Liverpool, to effect policies on cargo. On the 24th of December, 1861, the plaintiffs wrote to North, Ewing, & Co., "At what rate can you insure the hull, cargo and freight, &c., at and from Buenos Ayres to Laguna de los Padres, near Cape Corrientes, and thence to a port of call and for discharge in the United Kingdom? . . . We are informed there are vessels of 250 to 300 tons, trading regularly between that port and Buenos Ayres, so that there is little if any danger more than the direct passage. The captain, who is part owner, writes us that, having tackling for a ship of 600 tons, he is willing to run the risk of the port as there is no danger." North, Ewing, & Co., answered by telegram, "The rate by the *Matanzas* would be five guineas ship and freight, and four guineas cargo,"

to which the plaintiffs answered, "The premium we think high, and will do nothing till beginning of next month."

The matter was then placed by the plaintiffs in the hands of Alexander Kay & Co., brokers of Glasgow, who, dropping out any mention of Laguna de los Padres, wrote to Campbell, Cross, & Co., brokers of Liverpool, on the 31st of December, 1861, "Please open policy for 3000*l.* on bone and bone ash, valued at as per invoice or invoices, &c., warranted free of average unless general, or the ship be stranded, sunk, or burnt, per *Matanzas*, &c., at and from Buenos Ayres, 'and port or ports of loading in the province of Buenos Ayres,' to port or port of call and discharge in the United Kingdom. Premium at or under 40*s.*, &c.; since writing the foregoing we have learnt that the *Matanzas* commenced loading on the 13th November, and may be expected to sail in all December. . . . You will observe that D. Harrower is the master, long in the employ of James Ewing & Co. The *Matanzas* is chiefly owned by Captain Harrower."

Upon this letter the policy in question was effected at a premium of 40*s.* On the 4th of January, 1862, however, Kay & Co. wrote to Campbell, Cross, & Co., "We are favoured with yours, enclosing copies of policies; but on looking over them we find you have omitted to insert the words 'or port or ports of loading in the province of Buenos Ayres.' On the 10th of January, Kay and Co. wrote, "Please get the word 'and' substituted for 'or.'"(1) The letters of the 13th of November were not communicated to Campbell & Co., or to the defendant, nor was the fact that the vessel was to load at Laguna de los Padres, or that it was known to the plaintiffs at what port the vessel was going to load, and Campbell & Co. and the defendant were ignorant of the letters and of the facts. The premium charged was that which underwriters were then usually charging on bone and bone-ash from Buenos Ayres direct to the United Kingdom.

(1) The letter was as follows:—"We regret again to trouble you with this matter, but the assured have returned the copies [of policy] to us in order to have the voyage worded as follows, as was ordered in ours of the 31st ult.: say, 'at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres to port or ports of call $\frac{\text{and}}{\text{or}}$ discharge in the United Kingdom.' Please get the word 'and' substituted for 'or.'"

1870

HARROWER v. HUTCHINSON.

Laguna de los Padres was, in 1861, unknown to underwriters as a place of loading; and if underwriters, on a policy like the policy sued on, had been informed that the vessel was going to load there, they would have required a higher premium than that charged. Laguna de los Padres is situate on the coast, and in the province of Buenos Ayres, near to Cape Corrientes; there is no artificial port or mole, but merely a salader or slaughterhouse, and a wooden jetty or pier. There is a small village occupied by the people at work at the salader and others. The place is rather open to the east and north-east. The roadstead is protected by natural headlands on either side, which form a kind of bay. Vessels calling there have to anchor about a quarter of a mile from the shore, in the roadstead, and load and unload by means of lighters and small craft belonging to the saladers and others in the place, which ply between the vessels and the jetty. There is a resident government magistrate at Laguna. The chief exports of the place are hides and bones and bone-ashes. There is a regular trade between Buenos Ayres and Laguna de los Padres, but not between the latter place and Europe.

On the 15th of January, 1862, the *Matanzas* sailed from Laguna de los Padres for Buenos Ayres, to complete her cargo for England, and on the 16th of January was wrecked off Cape San Antonio, and the cargo was totally lost. The Court was to be at liberty to draw such inferences of fact as a jury would be entitled to draw.

Upon this case (1) the Court of Queen's Bench gave judgment for the plaintiffs on the grounds that Laguna de los Padres was a port within the terms of the policy, and that although the plaintiffs had concealed a material fact, yet it was a fact which by the terms the underwriter had taken on himself to know.

Upon the argument before us, it was contended on behalf of the defendant, the plaintiff in error, that this was not a port within the policy, because a policy in the present form includes only usual ports of loading in the trade; that the trade contemplated in this policy was between South America and the United Kingdom; and that this was not a port usually frequented in such trade; and further, if this was a port within the policy, yet that there was such a concealment of a material fact or facts as vitiated the policy.

(1) Law Rep. 4 Q. B. 523.

On behalf of the plaintiffs, the defendants in error, it was argued that Laguna de los Padres is a place on the coast mentioned in the policy frequented for the purpose of loading and unloading by ships, and was therefore a port; and if so, it was a port by the very terms of the policy within the risk; and that the plaintiffs were not bound to inform the underwriters, either that they intended to send the ship to that port, or that there was such a port on the coast; for that the underwriters had signed a policy including the risk of the ship going to this or any other port on the coast, and was bound to know that there was such a port and the nature of it.

The majority of the Court are of opinion that Laguna de los Padres was a port, and a port within the policy, if the policy were otherwise binding.

In *De Longuemere* v. *The New York Fire Insurance Co.* (1) a port is thus described by Kent, C.J., "A landing-place where ships usually deliver and receive their cargoes. It is frequently defined in the books," he says, "in this commercial sense, without any particular reference to its fitness for naval security." And further on in his judgment he says, "If Silam was a port of the same kind with that of Sisal, having only a practicable and usual place for anchorage and loading and unloading of cargoes, it came within the description in the policy."

And in *Cockey* v. *Atkinson* (2), an open roadstead, being a usual place of loading and unloading, was held for that cause to be a port. See also the cases quoted in the argument in this case in the Court below. (3) Within the rule thus laid down, Laguna de los Padres was a port; it was furthermore a port within the province of Buenos Ayres, and therefore it was a port within the express terms of the policy.

We do not think that the case of *Ashley* v. *Pratt* (4) is an authority for the proposition, that upon a policy expressed in such wide terms as the present, a port within the locality described is excluded, because it is not usually frequented as a loading port in the particular trade described in the policy.

(1) 10 Johns. N. Y. Rep. 120, 125.
(2) 2 B. & A. 460.
(3) Law Rep. 4 Q. B. 531.
(4) 16 M. & W. 471; in error, 1 Ex. 257.

1870

HARROWER v. HUTCHINSON.

Upon the next question, in the absence of a plea of fraud, which the facts disclosed in this case might perhaps have supported, we are bound to treat the case as one of concealment only. But so treating it, we are of opinion that there was here a concealment of material facts, namely, the letters of the 13th of November and the information contained in them, which the assured was bound to communicate to the underwriter. It is stated in the judgment of Lush, J., in the Court below, and was not denied in argument before us, and indeed could not have been denied with effect, that the fact which was concealed in this case was a material fact, that is to say, one which if made known to the underwriter would have affected his estimate of the character and degree of the risk. It was a fact known to the plaintiffs, the assured, and unknown to the defendant, the underwriter. Within the general rule, therefore, laid down in many cases, it was a fact which the assured was bound to disclose, unless it can be correctly affirmed that it was a fact which the assured had a right to assume was within the knowledge of the underwriter; or concerning which the underwriter had waived further information; or which the underwriter was bound to know. The facts and correspondence set out in the case shew that the plaintiffs and their agents knew that Laguna de los Padres was unknown to underwriters in general as a port of loading, and even, as we think, that it was unknown to the defendant. It is impossible, therefore, as it seems to us, to maintain that the plaintiffs were authorized to assume that the defendant knew of that port as a port of loading. The case in which an underwriter is said to waive being informed of a fact is where a representation made to him should suggest a doubt or inquiry to the mind, and he omits to make the inquiry: Phillips on Insurance, s. 568. In the present case there was no such representation, and therefore that doctrine cannot apply. It might have applied if the name of Laguna de los Padres had been mentioned, and the defendant had made no inquiry about it. The real question in this case, therefore, is, what are the facts which an underwriter ought to know? In *Carter* v. *Boehm* (1), Lord Mansfield thus states the proposition: "The assured need not mention what the underwriter ought to know; what he takes upon himself the knowledge of; or

(1) 3 Bur. at p. 1910.

what he waives being informed of." He then gives several instances of facts which the underwriter ought to know, and then he continues: "The reason of the rule which obliges parties to disclose is to prevent fraud, and to encourage good faith. It is adapted to such facts as vary the nature of the contract; which one privately knows and the other is ignorant of, and has no reason to suspect." He ends by saying (1): "What has often been said of the Statute of Frauds may with more propriety be applied to every rule of law, drawn from principles of natural equity, to prevent fraud, that it should never be so turned, construed, or used, as to protect or be a means of fraud." In Phillips on Insurance, s. 531, the material fact which may not be concealed is thus described: "And which is known, or presumed to be so, to the party not disclosing it, and is not known, or presumed to be so, to the other." In s. 571, speaking of the knowledge of trade which is to be assumed, he says, "The assured is not required to communicate to the underwriter facts which are presumed or proved to be known to those conversant with the trade, &c." In s. 593 he says, "The underwriter is presumed to know the usages of the particular trade insured, and these accordingly, need not be represented to the underwriter."

Now, usages of trade can only exist in a known and established trade, and all the analogies seem to shew that the usages of trade mentioned in s. 593, are confined to those of a known and established trade. Thus in s. 583, "If the voyage proposed for insurance is in contravention of a recent foreign trade law known to the assured, or which he is bound to know, and not known or presumed from its publicity or otherwise to be so to the underwriter, such intended contravention must be disclosed." In Arnould on Insurance, in the chapter on "Concealment," it is said, vol. i. 3rd ed. p. 520: "Concealment is the suppression of a material fact within the knowledge of the assured which the underwriter has not the means of knowing or is not presumed to know." Afterwards, as an instance, he says, vol. i. 3rd ed. p. 532: "A knowledge of the political state of the world, . . . and of the risk and embarrassments affecting the course of trade, . . . must necessarily be imputed to the underwriter, and therefore need not be disclosed; but it has been held in the United States, in *Hoyt* v. *Gilman* (2);

(1) 3 Burr. at p. 1918. (2) 8 Mass. Rep. 336.

1870

HARROWER v. HUTCHINSON.

Blagge v. *New York Insurance Co.* (1), and apparently on very good grounds, that the new or shifting regulations of foreign states by which the property is exposed to seizure, if privately known to the assured, ought to be disclosed by him, for they cannot be presumed to be necessarily within the knowledge of the underwriter." Again, he says, "The assured need not mention what the underwriter ought to know or takes upon himself the knowledge of. It is upon the principle that facts comprised in the general usages of trade need not be communicated. But in order to dispense with communication of anything done according to usage, such usage must be general and universally known to all engaged in the trade." And, again, vol. i. 3rd ed. p. 539: "Every underwriter is presumed to be as well acquainted as the assured himself with the general and established restrictions or commercial freedom which different states impose," &c.; these are, in fact, matters of general mercantile notoriety, which the assured is not bound to communicate. "But if the prohibition be of recent date, or only occasional in its nature, the assured, supposing him to have private means of information, ought to communicate the fact to the underwriter."

These analogies, which are founded on decided cases in both the countries of these respective authors, and the canon of construction to be applied according to Lord Mansfield to all rules for the preservation of good faith, seem to us to authorize the conclusion that in the present case, the underwriter was not bound to know that which no other underwriters, i.e. no other person engaged in the same trade or business as himself knew. He was not bound to know that Laguna de los Padres was a loading port in the province of Buenos Ayres, or that it was subject to local dangers. It is true that in s. 593 of Phillips on Insurance, it is stated that "The underwriter is presumed to know the local situation and circumstances of the ports comprehended within the voyage, and accordingly these need not be represented." But in the first place he speaks of "its being presumed," which, as we have before said, cannot in reason be applicable to a knowledge not possessed by any one else in the same trade as the underwriter, or which the assured knows to be not possessed by the particular underwriter; and, secondly, the analogous cases shew that the proposition must

(1) 1 Caines, 549.

be limited to ports generally known in trade or known to underwriters in general. In the case quoted, namely, *De Longuemere* v. *The New York Fire Insurance Co., Limited* (1), one port under discussion, namely "Sisal," was mentioned in the policy, and there was no statement that either it or the other port, "Silam," were unknown to underwriters in general.

We are, therefore, of opinion that the assured in this case concealed from the underwriter a material fact which was known to the assured and was not known to the underwriter, and that the fact so concealed was not one which the assured was entitled to presume was known to the underwriter, nor one as to which the underwriter had waived further information; nor one which the underwriter ought to have known, and consequently it was the duty of the assured to communicate the fact to the underwriter, and the non-communication vitiated the policy. For the reasons thus given, we are of opinion that the judgment of the Court below should be reversed, and that judgment should be entered for the defendant below, the plaintiff in error.

MARTIN, B. I am of opinion that the judgment of the Court ought to be for the defendant upon both points.

This is a policy of insurance upon a ship and cargo to proceed from Buenos Ayres to a port of loading in the province of Buenos Ayres, and from thence to Europe. I do not think that a place which is a common slaughterhouse with a jetty running into the sea, and where a few ships go for coasting purposes, is a port within the meaning of the policy. I think a port within the policy means a place or a port with respect to a voyage from America to Europe, and is a port where ships from Europe usually come and are loaded. In my opinion Laguna de los Padres was not such a port; it is a large South American slaughterhouse, with a jetty running out into the sea, not into a river; where vessels go to bring from it principally the produce of the slaughterhouse, those vessels being usually coasting vessels trading between Laguna and Buenos Ayres.

Secondly, I am of opinion that there was in this case wilful concealment. The assured knew perfectly well that the ship was

(1) 10 Johns. N. Y. Rep. 120.

1870

HARROWER v. HUTCHINSON.

going to Laguna, and did not communicate it to the underwriter. When, in seeking to insure the risk, they communicated the name of Laguna de los Padres to North, Ewing, & Co., they were informed that the premium would be five guineas. They afterwards conceal the name, and obtain an insurance from another underwriter at the rate of 40*s*. That is a concealment at the best. I should say it is something more; in my judgment it is a fraud.

WILLES, J. (1) I think judgment ought to be for the underwriters upon the ground that the policy was effected to cover a voyage from a place of loading previously used only by coasters, not known as a port, and where shipping was exposed to peculiar risk from local causes; all which was known to the assured, and material to the underwriters' estimate of the character and degree of the risk, and was concealed, whereby the policy was obtained at a less premium than the underwriters would have stipulated for had they known the facts. This is a case, not of mere concealment of the port from which the vessel was intended to sail, but of procuring a policy by this concealment of circumstances beyond and besides, though including, that fact, and which if disclosed would have enhanced the premium.

CLEASBY, B. In this case I agree with the judgment of the Queen's Bench, so far as it decides that there was no obligation on the assured to communicate to the underwriters that Laguna was a port of loading within the province of Buenos Ayres, or that the destination of the vessel was that port.

I think that, in general, provided the terms of a policy include all ports of loading of every description within a certain district, the existence of these ports is a matter equally within the knowledge, or presumed knowledge, of both parties, and that if the underwriters are ignorant as to the ports within the district, or wish for information as to what port is the destination of the vessel, it was for them to ask such questions as they deemed material, and then they would have been entitled to true answers: *Haywood* v. *Rogers*. (2) And it is of great importance not to break in upon this rule, otherwise the security of persons who had effected poli-

(1) This judgment was read by Martin, B. (2) 4 East, at p. 597-8.

cies, would be much diminished, and vexatious defences set up when claims were made.

The rule would, however, I think, be subject to this qualification, that the assured had not by any contrivance in the wording of the proposal and policy, intentionally hid from the underwriters what was the real risk intended to be covered, and so misled them and given them no opportunity of ascertaining that risk. I think the quotation of Lord Mansfield, so often repeated, in the great case of *Carter* v. *Boehm* (1), peculiarly applicable to this case "aliud est celare, aliud tacere," &c. Silence as to certain material particulars is one thing; but hiding and covering them up is another; and in such a contract as this, which is always said to be uberrimæ fidei, avoids the policy.

It is only necessary to consider the real state of facts, and then the wording of the proposal, and the reason for so wording it, and the case will, I think, be free from difficulty.

It was intended and expected that the vessel having taken in part of her cargo at Buenos Ayres should proceed to Laguna, there complete her cargo, and then proceed to the United Kingdom. Accordingly, the proposal made by Gray & Buchanan (the firm under which three of the plaintiffs carry on trade) was "at and from Buenos Ayres to Laguna de los Padres, near Cape Corrientes, and thence to a port of call and for discharge in the United Kingdom. (2) The answer they get to this proposal is, that the rate is five guineas on the ship and freight, and four guineas on the cargo. Accordingly that is given up, and the matter is placed in the hands of A. Kay & Co. At the time when they take the matter up the same state of things continued, and the vessel was known to have taken in cargo at Buenos Ayres, and having taken in what she could procure, then was to proceed to Laguna, and thence to the United Kingdom.

Now, under these circumstances, they might have effected an insurance at and from Buenos Ayres to a port of loading in the province of Buenos Ayres, and thence to the United Kingdom. But in that case the underwriters would have had a fair opportunity of asking what port, or they would have been bound. The form of

(1) 3 Burr. at p. 1910.

(2) See letter of the 24th of December, 1861, ante, p. 586.

1870

HARROWER v. HUTCHINSON.

the proposal in that case would have indicated that there was a known port for which the vessel was to proceed; and an answer would be given to the inquiry, and the actual state of facts would not have been misrepresented. But the real risk intended being what I have mentioned, and the object being to get it done at 40s., the form of proposal resorted to is, "at and from Buenos Ayres, and port or ports of loading in the province of Buenos Ayres to the United Kingdom." This general form hides and covers up the real risk. The words port or ports imply contrary to the fact, that it is uncertain whether the vessel will proceed to one port or several ports, and that the destination of the vessel is unknown and inquiry is thus prevented; and the underwriter, if he did not know of any ports of loading besides Buenos Ayres itself, would consider the additional words as unimportant. And it appears from the case that he did so, for he returned the policy as being at and from Buenos Ayres only. The agent for the assured then applies to have the additional words added, still misleading the underwriter as to the real facts by the general words referred to.

If the agent of the assured did not by this form of proposal hide and conceal from the underwriters the material fact that the vessel was to proceed to a particular port, which he supposed was unknown to the underwriters because he had never heard of it himself, the policy might be valid. But that is not my impression. I cannot but regard it as a contrived form of general words, properly applicable to a case where the particulars of the voyage are uncertain and unknown, and applied to a case in which everything was certain and known.

I am authorized to draw inferences, and the explanation given in Appendix B., No. 24, is not satisfactory. (1) This is in sub-

(1) Appendix B., No. 24, was as follows:—On the 16th of July, 1862, Kay & Co. wrote to Campbell & Co. a letter, which contained the following, "We have received your favour of yesterday containing three additional queries as to the insurance per *Matanzas*, and which we will answer in order. 1st. Mr. Muir, of James Finlay & Co., we are sure did name to us Laguna de los Padres as the probable port of lading, but never having heard of that place before, and being assured by Mr. Muir that it was in the province of Buenos Ayres, we suggested, in case of mistake, to word the policy in as general terms as possible, and hence, in giving the order for insurance, we said Buenos Ayres and port or ports in the province of Buenos Ayres."

stance the second objection relied on in the grounds of error (1), and for the reasons given us, I think it is a good one.

I also think that when the loss occurred, the vessel was not upon the voyage to which the policy applies. The vessel was lost upon the voyage back from Laguna to Buenos Ayres, which the vessel, contrary to expectation, was compelled to take.

This was clearly not the voyage which the assured intended to be covered by the policy as before explained. Nor is it the voyage mentioned in the policy when the state of facts to which the policy was to apply, is considered. That voyage begins at Buenos Ayres, and proceeds to port or ports of loading, and thence to the United Kingdom. If there was anything in the case to shew that Buenos Ayres would be considered as on the voyage from Laguna to the United Kingdom, this objection could not apply. If, for instance, vessels had been in the habit of taking in cargo at Laguna, and then proceeding to Buenos Ayres, and so to the United Kingdom, there might be an answer to this objection, but all that appears is that there was a coasting trade between Laguna and Buenos Ayres, and this would imply that cargo taken in at Buenos Ayres would be transhipped there if intended for the United Kingdom, and not that the same coasting vessel should carry them on. I cannot think the policy in this case would include any number of voyages backwards and forwards from port of loading to port of loading till the cargo was completed and the ship ready to sail.

I must say further, that I agree in the conclusions at which my Brother Martin has arrived, that Laguna is not a port of loading within the meaning of the policy. It is only a port for coasting vessels, and not for vessels proceeding to Europe or other countries. Now the agent for the assured supposed that the ship could and would proceed direct from Laguna to the United Kingdom, and did not intend to include it as a port for coasting vessels only. This appears distinctly from Appendix B., No. 1 (2) and No. 24. The

(1) The second objection in the grounds of error was: "That an insurance 'at and from port and ports' involves a representation that the assured does not know at what port the ship is to load."

(2) Appendix B., No. 1, was the letter of the 24th of December, 1861; see ante, p. 586.

1870

HARROWER v. HUTCHINSON.

underwriter did not hear of its existence, and therefore of course did not intend to include it.

Still, if the words were clear, and no ambiguity introduced into the meaning of them, the meaning could not be varied by the objects and intention of the parties. But it appears to me, first, that upon the proper construction of the policy, the words "ports of loading" mean ports of loading for Europe and other countries, including the United Kingdom, as the agent for the assured intended; and that following Buenos Ayres, they are ports ejusdem generis, namely, ports where cargoes might be loaded for the United Kingdom direct.

And, secondly, that as soon as it appears that there are two classes of ports in the province, viz., such ports as Buenos Ayres, for loading outwards and trading with Europe, which may, therefore, be supposed to be known to underwriters, and also such ports as Laguna for coasting vessels only, and which would probably not be so known, a latent ambiguity is introduced and parol evidence is admissible to shew which class of ports was intended, and then it is certain that both parties understood a port where the ship could load and proceed direct to the United Kingdom.

For the above reasons, I think that the plaintiffs cannot recover upon the policy in this case.

Judgment reversed.

Attorneys for plaintiffs: *Gregory & Rowcliffes.*
Attorneys for defendant: *Field, Roscoe, & Co.*

[IN THE EXCHEQUER CHAMBER.]

STRINGER AND OTHERS *v.* THE ENGLISH AND SCOTTISH MARINE INSURANCE COMPANY.

1870
June 17.

Marine Insurance—Loss by Capture—Sale of Goods by Prize Court—Deposit of Value to prevent Sale—Total Loss—Abandonment.

The plaintiffs insured with the defendants goods on board ship, for a voyage from L. to M. against the usual perils, including "takings at sea, arrests, restraints, and detainments of all kings and people." While on the voyage the ship was, on the 5th of November, 1863, seized by a cruiser of the United States of America, and taken to New Orleans, where a suit was instituted by the captors against the ship and cargo for the purpose of having them adjudged lawful prize as contraband of war. The plaintiffs, by their agents in America, did not abandon, but contested the captor's claim. On the 16th of June, 1864, the prize court gave judgment against the captors, and decreed restitution. On the 1st of July the captors appealed. On the 12th of September the plaintiffs, having been informed of the appeal, gave notice of abandonment to the defendants, which they refused to accept. On the 7th of December, 1864, and on the 9th of February, 1865, the plaintiffs gave the defendants notice that the prize commissioner had applied to the Court to decree the sale of the goods. The sale of the goods might have been prevented by depositing the full value of the goods, or giving bail for them, in the prize court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The goods had also much deteriorated in value. Neither the plaintiffs nor the defendants interfered; and on the 26th of May, 1865, the goods were sold by order of the Court. On the 15th of July, 1865, the plaintiffs, having been informed of the sale, wrote to the defendants informing them of the sale, and again giving them notice that they abandoned the goods:—

Held, affirming the judgment of the Queen's Bench, that on the sale of the goods and after notice of abandonment, the plaintiffs were entitled to recover for a total loss.

Quære, whether notice of abandonment was necessary.

Semble, that it was not.

ERROR from the judgment of the Court of Queen's Bench in favour of the plaintiffs, on a special case. (1)

The case is fully set out in the report in the Court below, and the facts sufficiently appear from the head-note and the judgments.

The arguments were the same as in the Court below.

May 14. *Benjamin* (with him *Kemplay*), for the defendants,

(1) Law Rep. 4 Q. B. 676.

1870

STRINGER v. ENGLISH AND SCOTTISH MARINE INSURANCE CO.

cited *Brown* v. *Royal Insurance Co.* (1); *Benson* v. *Chapman* (2); *Rosetto* v. *Gurney* (3); *Philpott* v. *Swann* (4); *The Maria and Vrow Johanna* (5); *Ionides* v. *Universal Marine Insurance Co.* (6); *Taylor* v. *Dunbar* (7); *Montoya* v. *London Assurance Co.* (8); *Mullett* v. *Shedden.* (9)

Mellish, Q.C. (with him *Watkin Williams*), for the plaintiffs, cited *Palmer* v. *Naylor* (10); *Dean* v. *Hornby* (11); *Lozano* v. *Janson* (12); *Holdsworth* v. *Wise* (13); *Dent* v. *Smith* (14); *Roux* v. *Salvador* (15); *Farnworth* v. *Hyde.* (16)

June 17. *Benjamin,* in reply, cited *Livie* v. *Janson* (17); *Tunno* v. *Edwards* (18); *Goldsmid* v. *Gillies* (19); *Thornely* v. *Hebson.* (20)

KELLY, C.B. The circumstances of this case are of a somewhat peculiar and unusual character; but the Court have received all the assistance from a reference to authorities, and from the arguments of Mr. Benjamin, that the case was capable of affording.

The circumstances of the case are these:—One Walsh had caused a quantity of goods, which had been insured by the plaintiffs on his behalf, to be shipped from this country to Matamoras in America, by the ship the *Dashing Wave,* and when she arrived very near to the port of destination, the ship and cargo were captured by an American ship of war in the month of November, 1863, and carried to New Orleans with a view to the institution of a suit for the condemnation of at least a portion of the cargo.

At this time, and upon the capture of the ship, it was competent for Walsh, the owner of the goods, if he had thought fit so to elect,

(1) 1 E. & E. 853; 28 L. J. (Q.B.) 275.
(2) 2 H. L. C. 696.
(3) 11 C. B. 176; 20 L. J. (C.P.) 257.
(4) 11 C. B. (N. S.) 270; 30 L. J. (C.P.) 358.
(5) 4 C. Rob. 348.
(6) 14 C. B. (N. S.) 259; 32 L. J. (C.P.) 170.
(7) Law Rep. 4 C. P. 206.
(8) 6 Ex. 451; 20 L. J. (Ex.) 254.
(9) 13 East, 304.
(10) 10 Ex. 382; 23 L. J. (Ex.) 323.
(11) 3 E. & B. 180; 23 L. J. (Q.B.) 129.
(12) 2 E. & E. 160; 28 L. J. (Q.B.) 337.
(13) 1 B. & C. 794.
(14) Law Rep. 4 Q. B. 414.
(15) 3 Bing. N. C. at p. 287.
(16) 18 C. B. (N. S.) 835; 34 L. J. (C.P.) 207.
(17) 12 East, 648.
(18) 12 East, 488.
(19) 4 Taunt. 803.
(20) 2 B. & A. 513.

to treat the case as a total loss. But then he must have given notice of abandonment to the insurers, the defendants in this suit. He made, however, no such election, but took the chance of recovering the goods, which he, no doubt, thought would meet with a very profitable and advantageous market, if he should recover possession of them, and could convey them to Matamoras; he therefore by himself, or by his agent, followed the goods to New Orleans, where the ship and cargo had arrived, and where immediately upon her arrival a suit was instituted to declare that the vessel, or at all events, that the goods were lawful prize as being contraband of war.

This suit continued for a very considerable time, and it appears to have been the opinion of the Court of Queen's Bench, that the continuance of the suit by appeal, from the month of November, 1863, until, at all events, the month of April or May in 1865, did not so alter the circumstances of the case and the condition of the assured in respect of the cargo, as to entitle him by reason of anything that occurred in this suit, to elect at that late period to abandon the goods as in a case of total loss. It is unnecessary for me to say whether I agree with the Court of Queen's Bench upon this point. But I feel it due to the plaintiffs, and those who advise the plaintiffs, to say I doubt very much when this suit had been so long pending,—I mean not at first, and until the first decree of restitution was pronounced, but afterwards, when the appeal and various proceedings took place which protracted the suit until this very late period in the month of April, 1865,—whether that lengthening and protracting of the suit would not of itself have constituted such a change in the circumstances affecting the risk and affecting the condition of the assured, as to have entitled him then to have treated the case as one of total loss, and to have abandoned the goods to the underwriters. But it is unnecessary to decide that question, for afterwards it appears that circumstances occurred which led to a decree for a sale of the goods, and to an actual sale of the goods which took place in May, 1865. There cannot be any doubt, though the case does not expressly find the fact, that from the great lapse of time between the arrival of the ship at New Orleans, and May, 1865, the goods had become deteriorated and considerably diminished in value. At that time, as before, there is

1870

STRINGER v. ENGLISH AND SCOTTISH MARINE INSURANCE CO.

no doubt that the owner of the goods might have obtained actual possession of his goods, and caused them to be conveyed to Matamoras for sale, if he could have given the requisite security according to the law and practice of the courts in America.

The decree having been made, and the sale having taken place, assuming as I do for the purposes of this cause, that no right to abandon had accrued to the owner until that period, the question arises, whether the duty was imposed upon him to give such security as was required, and so possess himself of the goods, and thereby to prevent the sale of the goods under the decree of the Court.

Undoubtedly, if the single question were whether he was possessed of the means to give that security, it might have been incumbent upon him to shew that he was unable to do so, and so to relieve himself from the duty thus sought to be imposed upon him. But we must take into consideration the circumstances of the case as they existed. It appears that, on various occasions before, he had been very desirous of repossessing himself of the goods; but still, whether from inability or from some other cause, does not distinctly appear, he never had given the security during the long period of time, whilst he was desirous of repossessing himself of these goods. What, then, was his inducement for abstaining from giving that security, even if he had had power to do so? It is impossible to look at the facts of this case as they now appear before us on the report of the officer of the Court in the United States, who had to report upon the circumstances and condition of the vessel and of the cargo, which report led to the decree, without being satisfied, as to the portion of the cargo in which Walsh was interested, not only that the decree was pronounced without his assent, but that the reason and cause of that decree must have been the deterioration of the goods which had already taken place, and the progress towards the total destruction of that part of the cargo.

Now, if that be so, the question arises, was it what a prudent owner of these goods uninsured would have done, or may have been expected to have done, to give the required security and so to have prevented the sale? In the first place we meet with a very unusual circumstance, but a very material feature in this

case, that such was the state of the currency of the United States of America at this time, that gold was at a premium of from 150 to 180 per cent., the actual currency of the country consisting chiefly, if not altogether, of greenbacks, so that the actual sum for which the plaintiff would have been required to give security, might have been so very large as to render it a matter of such extreme imprudence that no sane man would give the required security for the estimated value of those goods. Then there is the state and condition of the goods themselves. The object would have been to prevent the sale and to possess himself of the goods. If the goods had so far deteriorated as to justify the report on which the decree of sale was made, it would have been extremely unwise and extremely imprudent in the owner of the goods, or anybody else, in order to obtain possession of the goods in their deteriorated condition, to have given security to any substantial or considerable amount. Taking, therefore, all these circumstances into our consideration, together also with a not wholly immaterial fact, which appears upon this case, that Mr. Simpson, who had goods on board this vessel uninsured, abstained from giving security to prevent the sale of his goods, I am of opinion that the Court of Queen's Bench not only were perfectly justified in coming to the conclusion, but that they could not reasonably have come to any other conclusion, than that no prudent owner of these goods, uninsured, would have given the security in question.

Such being the circumstances of the case, the decree for sale, and the sale itself having taken place under circumstances in which there was no default on the part of the owner of the goods, we have to consider whether that sale justified the plaintiffs in then treating the case as one of total loss. I am of opinion, that the decree for the sale of the goods and the sale of the goods under that decree, which for ever took out of the possession of the owner the goods themselves, and took away from him the power of ever repossessing himself of the goods in specie, entitled the plaintiffs to treat the case as one of total loss. This loss of the goods arose, though not directly, out of the original capture (which was of itself, if it had been so treated, a total loss), through a series of consequences, viz. the institution, the different steps, and the continuance of the suit until the decree was pronounced; and the sale

1870

STRINGER v. ENGLISH AND SCOTTISH MARINE INSURANCE CO.

under the decree was—if I may use the expression—a completion of the total loss. It is unnecessary to determine whether an abandonment was necessary at this time, when the goods had been actually sold and never could have been brought into the possession or under the control of the owner again, or, whether that sale did not in itself amount to a completion or perfecting of the total loss of the goods. If it were necessary, the abandonment took place without any delay; for the sale having taken place late in the month of May, 1865, in the month of July, as soon as the plaintiffs, who had effected the insurance, though for the benefit of the owner of the goods, received intelligence of the sale under the decree at New Orleans, they forthwith gave notice of the sale and of the abandonment of the goods to the defendants, the underwriters. (1)

Under these circumstances, it appears to me, that all the requisites concurred necessary to establish a case of total loss, with or without abandonment; and, at all events, in this case the notice of abandonment having been given in reasonable time, we are all of opinion that the plaintiffs are entitled to recover, and that the judgment of the Court of Queen's Bench must be affirmed.

MARTIN, B. I am also of opinion that the judgment of the Court of Queen's Bench ought to be affirmed. This is an action on a policy of insurance, and the policy, though not exactly in the usual form, is a valued policy for 5000*l.*, upon goods valued at 11,500*l.* on board the ship *Dashing Wave,* on a voyage from Liverpool to Matamoras, and the adventures and perils which the defendants were contented to take upon them were "of the seas, men of war, takings at sea, arrests and restraints of kings, princes and people."

The vessel sailed with the goods on board, and arrived very near her port of destination; it was during the late American war, and a cruiser of the United States seized the *Dashing Wave* and the goods as being forfeited by reason of the vessel carrying

(1) It appeared from paragraphs 28 and 29 of the case, which have been inadvertently omitted in the report (Law Rep. 4 Q. B. 685), that on the 13th of July, 1865, on receipt of intelligence of the sale of the goods under the decree of the Court, the plaintiffs wrote to the defendants, informing them of the sale, and again giving notice that they abandoned the goods. The defendants replied, refusing to accept the abandonment.

contraband of war, and the *Dashing Wave* was carried into New Orleans for the purpose of condemnation.

The first question is, what was the consequence of the capture? Mr. Benjamin has stated truly the consequence. The object of the insurance being that the goods should arrive under the control and in possession of the assured at the port of discharge, when they were once captured or taken by any of the means mentioned in the policy by a person hostile to the owner, he would have a right to abandon them; and upon that capture he would have had a clear right to declare his intention, or rather his wish, that the goods should be considered as lost to him, and that the underwriters should be responsible to him for the agreed value on the policy. But it was quite competent to him not to take that course, because, assuming the goods were insured under their value, he might expect that in a short time the goods would be returned to him, and that it was more for his interest to retain his ownership in the goods, with the expectation of being able to take them to the port of discharge, and to sell them there at a large profit; and he had a right to follow that course, and he did follow it, and for the purpose of my judgment I assume that he stated to an underwriter applying to him to abandon the goods, that he would not abandon them, for he thought he had a better chance by remaining the holder of the goods; and, therefore, at this time there was no right to recover as for what is called a "total loss." It is unfortunate that that term is used. A total loss, in one sense, means where goods go to the bottom of the sea, or where the goods are burnt or utterly destroyed; in another sense a total loss means that the man who owns the goods is deprived of them in some way or other, and a great part of the argument turns upon the distinction between these two species of losses.

But the matter proceeds further than that. The goods are taken into New Orleans, and proceedings are immediately instituted in the prize court there for the purpose of their condemnation; this suit proceeded for upwards of eighteen months, and in the meantime, as we might expect, the goods became very much deteriorated. In the result the prize court determined that the capture was not a lawful capture, and decreed restitution accordingly; but the captors did what they had a right to do, they

1870

STRINGER v. ENGLISH AND SCOTTISH MARINE INSURANCE CO.

appealed to the Supreme Court at Washington, and, while the appeal was pending in that court, an order was made by that court, which I apprehend was a perfectly lawful order, that the cargo should be sold and the proceeds of sale deposited as the law directed. That order being made, the proper officer proceeded with the sale; and, in my opinion, when that sale took place, the property in those goods was taken out of the owner, so that it became impossible for him to take those goods, under his original ownership, to the port of discharge; and, upon that taking place, the goods—I will not say were totally lost, because I have complained of that being an ambiguous expression—but were taken entirely from the owner's dominion and control, and were absolutely taken away from him; and in my judgment, after that event took place, the word "abandonment," in the sense in which I have used the word with regard to what took place anterior to this, does not apply at all. The consequence was, that there was, in my judgment, a total deprivation of the ownership of the goods in the assured for the purpose of the adventure, and that he was, therefore, entitled to the whole value of his goods under the valued policy; but the underwriter was entitled to the proceeds of the goods. I may, however, use the word "abandonment" in this sense: before an underwriter could maintain an action for money had and received to his use, there must have been an intimation from the owner of the goods that he desired to part with the interest he had in that money. But, in my judgment, such an abandonment, though intelligible enough, is not that species of abandonment which might be necessary while the goods existed in specie, and, possibly, in such a condition as to come back to the assured. He was, before he could recover as for a total loss, obliged to say, "The property in these goods has passed from me, and I transfer my interest in the proceeds to the underwriters." In my judgment, by the sale of these goods under the lawful order of the court of prize, the assured was deprived of all dominion and property in them. They were taken out of his possession. He was deprived of all property in and dominion over his goods; and, therefore, under these circumstances, he is entitled to recover the full amount of his insurance, the underwriters, as I have said, being entitled to the proceeds of the sale.

1870

STRINGER v. ENGLISH AND SCOTTISH MARINE INSURANCE CO.

But it is said there was negligence on the part of the assured in not giving bail. There are no facts in this case to shew that. It may possibly be that there was negligence, but it seems to me that they who prepared this case had not in their contemplation the question of negligence; if they had, it would have been stated in plain words. What appears is that these goods,—and I take it that it is so in every case where goods are under the control of a prize court,—might have been restored to the owner upon his giving bail for the amount. The object being to secure to the captors the value of the goods, and that they may not be destroyed or wasted. I take it that in every case of this kind it is usual, as a matter of law upon giving bail, that the party shall be entitled to repossession of his goods. It was intimated early that the owner might have got possession of these goods by giving bail, but there seems to have been some difficulty about it, and the assured thought that the underwriters should take part of the trouble, and expense, and inconvenience of procuring this bail, and, accordingly, there is a correspondence; and if it was meant to be contended that, by reason of some negligence on the owner's part, this bail was not given, and that the loss was consequent, as Mr. Benjamin said, without saying that the original loss was occasioned by the not giving bail, we ought to have had the facts much more distinctly stated.

Mr. Benjamin cited the case of *Thornely* v. *Hebson* (1) as an authority upon this point. It is not, however, in his favour. In that case the ship was deserted, but it was taken possession of by some salvors, and carried into a port, and the Court distinctly decided that that was not a total loss. The ship, however, having gone into port, proceedings were taken in the Court of Admiralty, and the ship was sold to pay the salvors; and the Court said, most rightly, unless they were to hold that a sale under the order of the Court of Admiralty was a total loss per se under the policy of insurance, they must decide against the insured, for what took place in the way of a loss by a peril insured against was not a total loss; and the total loss which did take place was by reason of a sale by the Court of Admiralty; and Holroyd, J., pointed out, as indeed did all the judges, that to hold that to be a total loss would be holding that which was really a partial loss to

(1) 2 B. & A. 513.

1870

STRINGER v. ENGLISH AND SCOTTISH MARINE INSURANCE CO.

be a total loss, because the assured had not taken a step to prevent this sale which he ought to have taken. I entirely concur in everything my Lord has said, and I think that this judgment ought to be affirmed.

CHANNELL, B. I am of the same opinion. I do not think it necessary to add anything to what the Lord Chief Baron and my Brother Martin have said; but I wish to state that my opinion is founded on the ground that the sale of the cargo by order of the prize court gave the plaintiffs the right to maintain an action on the policy for a total loss.

KEATING, MONTAGUE SMITH, and BRETT, JJ., and CLEASBY, B., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Oliverson, Peachey, Denby, & Peachey.*
Attorneys for defendants: *Flux, Argles, & Rawlins.*

June 17.

DAVIES *v.* SNEAD.

Slander—Privileged Communication—Parishioner and Clergyman.

7 QBD 674

When words imputing misconduct, of which two persons are alleged to have been jointly guilty, are spoken to one of them under circumstances which make the communication privileged as to him, the slanderous statement is privileged as to the other, and the latter cannot maintain an action for defamation.

The defendant mentioned to the rector of her parish a rumour that she had heard publicly uttered, impugning his conduct and the conduct of his solicitor, the plaintiff, in the administration of a certain trust. The plaintiff having brought an action for slander against the defendant, the jury found that the words complained of were spoken bonâ fide and without malice, under the belief that it was important for the defendant's rector to know the rumour, in order that he might clear his character:—

Held, that, upon this finding, the communication was privileged; and that the privilege extended to the alleged slander of the plaintiff, as the communication could not be made without mentioning him.

DECLARATION for slander imputing misconduct to the plaintiff as an attorney and solicitor.

Plea: Not guilty. Issue thereon.

At the trial before Channell, B., at the Breconshire summer

assizes, 1869, it was proved that the plaintiff was a solicitor and the legal adviser of the Rev. H. Harris, who was trustee under a marriage settlement under which one Dixon, a widow, and her children were beneficially interested. The defendant resided in the parish of which Mr. Harris was rector. During a visit he paid her she, in the course of a conversation at which other persons were present, stated as follows: "Your name is pretty well up in the town of Brecon. Your and your scoundrel solicitor's names are ringing through the shops and streets of Brecon. You are spoken of as robbing the widow and orphan—you to build your church, and he to marry his daughter." This was the slander charged in the declaration.

The learned judge told the jury that if there was express malice the action would lie; but if there was no express malice, they might consider the communication privileged, provided that they were of opinion that the defendant was bonâ fide telling Mr. Harris facts important for him to know, in order to clear his character.

The jury negatived malice; and a verdict was entered for the plaintiff, with leave to the defendant to move to enter a verdict for her on the ground that, under the circumstances proved at the trial, the defendant was not liable for the words found to have been spoken bonâ fide without malice.

A rule was obtained accordingly.

J. W. Bowen and *C. E. Coleridge* shewed cause. The defendant volunteered the statement to Mr. Harris, and made it in the presence of third persons and in the absence of the plaintiff. These circumstances take the statement out of the rule respecting privileged communications: *Toogood* v. *Spyring* (1); Starkie on Slander, 3rd ed. p. 526. Much of the conversation refers to the plaintiff only, and could not affect Harris.

[LUSH, J. The statement is not divisible. How could the defendant recount what was said about Harris without including what was said of the plaintiff?]

There is no decision which allows a person uttering a slander such as this to shelter himself under the doctrine of privileged communication. In *Coxhead* v. *Richards* (2) a letter was shewn

(1) 1 C. M. & R. 181. (2) 2 C. B. 569.

1870

DAVIES v. SNEAD.

only to parties interested containing the defamatory statement, but in the present case the slander was uttered in the hearing of third persons.

[BLACKBURN, J. Does the fact of the presence of third persons do more than tend to shew that the communication was malicious? Though that circumstance alone is not conclusive on the question of malice: *Manby* v. *Witt* (1).]

If a person, not in answer to any question, makes a slanderous statement in which he has no personal interest, his statement is not privileged: *Brooks* v. *Blanshard.* (2)

H. S. Giffard, Q.C., and *Michael,* in support of the rule. On the question of malice the finding of the jury is conclusive; and if the statement can, from any point of view, be considered a privileged communication, the defendant is entitled to the protection: *Toogood* v. *Spyring* (3) is expressly in point. The defendant was a parishioner, and, therefore, was interested in telling Mr. Harris something that affected his private character. A communication made bonâ fide upon a matter in which the person communicating has an interest, or in reference to which he has a duty, is privileged if made to the person having a corresponding interest or duty: *Harrison* v. *Bush* (4); and the duty which justifies a person in making a statement in disparagement of another is not only a duty enforceable by law, but a moral or social duty. The defendant was, under the circumstances, justified in making the statement to Mr. Harris; and, as she could not refer to him without mentioning the plaintiff, the communication is privileged as to him also.

BLACKBURN, J. We must assume that the jury found the facts correctly, and then see if the case falls within the rule respecting privileged communications; if it does, the verdict must be for the defendant.

I understand the learned judge, after reserving the point as to whether the communication might be privileged, to have told the jury that if there was malice, then the action would lie; if there was no malice they might deem it a privileged communication,

(1) 18 C. B. 544; 25 L. J. (C.P.) 294. 2 Jur. N.S. 1004.
(2) 1 C. & M. 779.
(3) 1 C. M. & R. 181.
(4) 5 E. & B. 344; 25 L. J. (Q. B.) 25. 2 Jur. N.S. 90

1870

DAVIES v. SNEAD.

should they think that the defendant, in relating to Mr. Harris the matters which she had heard, was telling him facts important for him to know respecting his character, she being a parishioner and also a friend. The jury have found that the words were spoken bonâ fide, and without malice. The general rule as to slander is clear enough—that where words are spoken injurious to third persons an action will lie, special damage also being essential in some cases but not in others. The act of ill-speaking, it is said, implies malice. I should prefer to say an action will lie if the words are spoken *wantonly*, that is, without such occasion as would render it right for a person to speak them; but I think the two phrases mean much the same thing. The difficulty is to determine when it becomes right for a person to speak. There is a large class of cases where there is no duty, other than a duty of imperfect obligation, to come forward and state facts tending to the disadvantage of a third person. A common instance is that of a master answering inquiries about a servant, and the reason given in that case for the application of the doctrine of privileged communication is, that without such a protection the affairs of life could not go on. Great difficulty sometimes arises in drawing the line between slander and privileged communication; the strongest case on this question is *Coxhead* v. *Richards* (1), a case in which the Court of Common Pleas was divided in opinion, and everything was said that could be said upon the subject.

But I think the result of the two judges' opinions, which were soon afterwards followed in the case of *Blackham* v. *Pugh* (2), is, that where a person is so situated that it becomes right in the interests of society that he should tell to a third person certain facts, then if he bonâ fide and without malice does tell them it is a privileged communication. I think that the present case falls under that rule. I cannot help thinking that when a parishioner hears matters injurious to the clergyman, which would injure his authority and influence as a clergyman, if those facts are bonâ fide told under the belief that they are important for him to know, they come within the category of privileged communications.

It was for the jury to say, whether this statement was made bonâ fide, and the facts were important for Mr. Harris to know; and

(1) 2 C. B. 569. (2) 2 C. B. 611.

1870

DAVIES v. SNEAD.

although I have some doubts whether I should have come to the same determination, the finding is conclusive on the matter. Having regard to the relation in which the parties stood to each other, I think that the defendant's statement did fall within the class of privileged communications, and that the rule should therefore be made absolute.

MELLOR, J. I am of the same opinion. The ordinary rule is, that from the speaking of defamatory words the law infers malice, unless the circumstances attending the publication of them rebuts the presumption of malice.

The jury were of opinion that the words spoken were important for the clergyman to know; that the defendant thought them important for him to know; and that she honestly and bonâ fide repeated them to him in order to enable him to take steps to clear his character. It was contended that the privilege would not include her mention of the plaintiff, but I think that was answered by saying that it was impossible to exclude the reference to the plaintiff and yet tell Mr. Harris the slanders against him. I think, therefore, that the words were spoken under such circumstances as that the jury might or might not have found they were spoken bonâ fide; and I rather agree with my Brother Blackburn in thinking that the words being spoken before several persons were somewhat unnecessarily and wantonly uttered; and I should not have been dissatisfied if the verdict had been the other way. The jury, however, have negatived express malice. They have found that these words were spoken bonâ fide by the defendant to the clergyman with respect to a report affecting him in his character of a clergyman and a trustee, and, therefore, I think this rule should be made absolute.

LUSH, J. We must take the finding of the jury, that the defendant, in communicating to Mr. Harris what she had heard, was actuated by the honest motive of enabling him to set himself right and clear his character, and not by the motive of further disseminating the defamatory matter. The question seems to me to entirely depend on the bona fides with which the defendant acted; and, as the jury have found bona fides, I think the occasion

was privileged. It was argued that there was no privilege as to the plaintiff. I think, with my learned brothers, that it is impossible to sever the part of the statement relating to Mr. Harris from that relating to the plaintiff.

1870

DAVIES v. SNEAD.

Rule absolute.

Plaintiff in person.

Attorney for defendant: *Games, Brecon.*

MOUNTSTEPHEN *v.* LAKEMAN.

June 30.

Statute of Frauds (29 *Car.* 2, *c.* 3) *s.* 4—*Promise to be answerable for the debt or default of another, where no actual liability on part of the third person—Guarantee.*

A promise to be answerable for the debt of another person is within s. 4 of the Statute of Frauds, although that other person never becomes legally indebted to the promisee; it is sufficient to bring the promise within the statute that, at the time the promise is made, the promiser and promisee expect that a legal obligation towards the promisee will be incurred by the third person.

The plaintiff was employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed, the board gave notice to the occupiers of the adjoining houses to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had elapsed, the plaintiff and the defendant met; the defendant inquired, "What objection have you to make these connections?" the plaintiff said, "I have no objection to do the work if you or the local board will give the order;" the defendant replied, "You go on and do the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the local board, and sent in the account to the board debiting them with the amount. The board refused payment on the ground that they had not authorized the order. And after more than two years, the amount being still unpaid, the plaintiff made a claim and brought an action against the defendant:—

Held, that, coupling the expressions used with the position and conduct of the parties, the defendant's engagement did not amount to an undertaking to be primarily liable for the work, but only to a promise that, if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another person within s. 4, although, in fact, the board never became indebted; and that the promise not being in writing could not be enforced.

Reversed in Ex Ch 1 Q B 196 Rev'd in H L

FIRST count that the defendant was the chairman of the Local Board of Health for the district of Lower Brixham, and in con-

1870

MOUNT-STEPHEN v. LAKEMAN.

sideration that the plaintiff would do and provide certain work and materials for the board at the request of the defendant, as and assuming to be agent of the board, the defendant promised the plaintiff that he was authorized by the board to make the request, that the plaintiff relying on the defendant's promise did the work; breach, that the defendant was not authorized.

Second count, that the defendant, being such chairman, in consideration that the plaintiff would do and provide work and materials for the board at the request of the defendant, the defendant promised to obtain for the plaintiff from the board a contract whereby the board should be legally bound; breach, that the defendant did not obtain any such contract.

Third count, for work and materials done and supplied by the plaintiff to the defendant at his request.

Pleas:—To the first and second counts: 1. That the defendant did not promise as alleged. 2. That the plaintiff did not do the work for the board at the defendant's request. 3. To the third count, never indebted.

Issue thereon.

There was also the following count added at the trial:—That the defendant was the chairman of the Local Board of Health for the district of Lower Brixham, and, in consideration that the plaintiff would do and provide certain work and materials to be used in drainage and other works for the board at the request of the defendant, the defendant promised the plaintiff that he would pay the plaintiff a reasonable price for the work and materials, if at any time thereafter the board should refuse to pay the plaintiff a reasonable price for the same; and the plaintiff relying on the defendant's promise did the work and provided the materials for the board at the request of the defendant; and afterwards the board refused, and still refuse, to pay the plaintiff a reasonable price, or any price whatever, for the same; and all conditions were performed, and all things happened, and all times elapsed necessary to entitle the plaintiff to a performance of the promise of the defendant, and maintain this action for the breach hereafter alleged; yet the defendant did not pay the plaintiff a reasonable price for the work and materials, or any price whatever, for the same, but wholly refused so to do, whereby the plaintiff has

lost the moneys he has paid, and been deprived of the profits he ought to have made in and by doing the work and providing the materials.

At the trial before Kelly, C.B., at the last Devon Spring Assizes, it appeared that the action was brought to recover 287*l.*, the price of certain work done by the plaintiff under the following circumstances:—The plaintiff had been employed by the Local Board of Health of the district of Lower Brixham to construct a sewer in part of the town; and when the sewer was nearly completed, the board had passed a resolution that notices should be served on the various occupiers of the adjoining houses to connect their drainage with the sewer, and notices were accordingly served on the 20th of March, 1866, under s. 69 of 11 & 12 Vict. c. 63, to do the work within twenty-one days, or the board would do it at their expense. The term of the notices would expire about the 10th of April; and on the 3rd or 4th of April the plaintiff had an interview with the defendant, who was the chairman of the board, when, according to the plaintiff's evidence, the defendant said, "What objection have you to make these connections?" meaning the laying down of the junction pipes; the plaintiff said, "I have no objection to do the work, if you or the local board will give me the order." The defendant said, "You go on and do the work, and I will see you paid." The plaintiff accordingly did the work, under the superintendence of the surveyor of the local board, and sent in his account to the local board, at the end of 1866, debiting them with the amount. A correspondence ensued, the board refusing to pay the amount, urging, as was the fact, that they had not given the order; several interviews betwen the board and the plaintiff also took place from time to time; and in November, 1869, the plaintiff's account being still unpaid, he demanded payment of the defendant. The defendant repudiated all liability, on which the plaintiff brought this action.

The defendant denied that any conversation like that detailed by the plaintiff ever took place between them: and other evidence was given corroborating, more or less, the case of either party.

At the end of the plaintiff's case the defendant's counsel submitted that there was no evidence to support either of the counts as the declaration stood; the Chief Baron refused to nonsuit, but

1870

MOUNT-STEPHEN v. LAKEMAN.

said he would reserve leave to the defendant to move; and he gave leave to the plaintiff to add a count in the form above given, which he thought might be supported, if the jury should be of opinion that the conversation spoken to by the plaintiff did take place.

The jury found for the plaintiff for the amount claimed; and leave was reserved to the defendant to move to enter a nonsuit, if the Court should be of opinion that there was no evidence on which the jury could properly find for the plaintiff.

A rule was afterwards obtained to enter a nonsuit pursuant to the leave reserved, or for a new trial on the ground that the verdict was against the weight of evidence.

Lopes, Q.C., and *Charles*, shewed cause. The conversation detailed by the plaintiff went to evidence a primary liability on the part of the defendant; it amounted to a promise to pay the plaintiff for the work. But assuming that it would only sustain a promise on the part of the defendant to pay if the local board did not, that is not a promise to be answerable for the debt, default, or miscarriage of another within s. 4 of the Statute of Frauds. At the time the promise was made there was and could be no debt on the part of the local board, as they could not do the work till after the twenty-one days had elapsed; and they afterwards refused to pay on the ground that they had not given the order. There therefore never was any debt on their part; and in order that there may be a promise within the section there must be, at some time or other, an actual debt of the third person. The law is so laid down in the text books. Thus in Chitty on Contracts, 8th ed. p. 475, it is said: "It is clearly settled that the statute applies only to *collateral* engagements, that is, to cases where there exists a debt or liability on the part of a third person, independently of the engagement of the guarantor; and that it has not, either in its words or principle, any reference to cases where there is an original promise to pay a debt or satisfy a demand or damages for which no other person was ever responsible." The cases are collected in the notes to *Birkmyr* v. *Darnell* (1), and in the notes to *Forth* v. *Stanton* (2). In the latter it is said, "A distinction was formerly

(1) 1 Sm. L. C. 5th ed. 262. (2) 1 Wms. Saund. at pp. 211 b, 211 c.

taken between a promise for the payment of goods *before* and *after* the delivery. The former was held to be an original undertaking, and so not within the statute, but the latter a collateral undertaking, and therefore within the statute: *Jones* v. *Cooper* (1). But this distinction has been since overruled, and the construction now is, that if the person for whose use the goods are furnished *is liable at all*, any promise by a third person, upon sufficient consideration, to pay that debt must be in writing: *Matson* v. *Wharam*" (2). Other cases cited in the notes shew that the third person must be and remain liable, such as *Goodman* v. *Chase* (3), and *Kirkham* v. *Marter* (4); and Parke, B., delivering the judgment of the Court in the later case of *Hargreaves* v. *Parsons* (5); thus lays down the construction which is to be put on the statute: "The statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty by, that other person towards the promisee." *Harris* v. *Huntbach* (6) is directly in point. There a promise to be answerable for work, not necessaries, to be done for an infant, who therefore could not contract, was held to be an original promise, and not a collateral promise within the statute. Lastly, there was evidence against the defendant on the first count, on the principle of *Collen* v. *Wright* (7); which was lately carried still further in *Cherry* v. *Colonial Bank o Australasia* (8).

H. T. Cole, Q.C., and *Pinder* in support of the rule. To whom credit was given, is, no doubt, a question for the jury; but, in order to ascertain that, reference must be had to the position o the parties: *Keate* v. *Temple* (9). It is quite clear that the defendant did not mean to make himself primarily liable; and is equally clear that the plaintiff so understood him, and gave credit, in the first instance, to the board. The defendant's promise therefore amounted to a promise to be answerable for the debt of another. It is true that there was no actual debt, but that is immaterial, as it has long been decided that a promise to be

(1) Cowp. 227.
(2) 2 T. R. 80.
(3) 1 B. & Ald. 297.
(4) 2 B. & Ald. 613.
(5) 13 M. & W. 561, 570.
(6) 1 Burr. 373.
(7) 8 E. & B. 647; 27 L. J. (Q.B.) 215.
(8) Law Rep. 3 P. C. 24, 31.
(9) 1 B. & P. 158.

1870

MOUNT-STEPHEN v. LAKEMAN.

answerable for a debt of another, to be afterwards contracted, as by the future delivery of goods to him, is within the statute: *Matson* v. *Wharam* (1). *Harris* v. *Huntbach* (2) is distinguishable; the ground of the decision was that the infant could not be liable, and therefore the plaintiff's undertaking could not be collateral: see per Foster, J. Here the work was done on the credit of the board, and conceding that they have not become bound either de facto or de jure, they might have contracted for the work after the notices had expired; and if the contract of the defendant had been, in so many words, so as to admit of no doubt, "In consideration of you, the plaintiff, doing the work on the credit of the board, I will pay if they do not," that would clearly be a contract of suretyship only and within the statute; and the contract once made between the parties cannot be afterwards altered in its legal character by the fact of the person who was expected to be the original debtor failing to become bound; there is a default on his part, whether it be by reason of his failing to contract or failing to perform his contract.

BLACKBURN, J. I am of opinion that the rule must be absolute to enter a nonsuit. The plaintiff would be entitled to succeed on the count for work and labour, if the defendant had ordered the work on his own credit; but there was no evidence of this primary liability on which the jury could have found a verdict for the plaintiff. The plaintiff's statement is: "The defendant said, 'What objection have you to make these connections?'—meaning the laying down of the junction-pipes. I said, 'I have no objection to do the work if you or the local board will give the order.' He said, 'You go on and do the work, and I will see you paid.'" It is true that the phrase is ambiguous, and it might mean, "Do the work for me," that is, on my credit, "and I will pay if the board do not;" and in ordinary cases it might be for the jury to say what was meant; but in the present case it is plain that the order was intended, and understood by both parties to have been given, by the defendant as chairman on behalf of the local board. The subsequent conduct of the plaintiff is conclusive as to this: he not only does the work under the superintendence of the surveyor of

(1) 2 T. R. 80. (2) 1 Burr. 373.

the local board, but sends in the account to them, charging them with the amount; and it is not till a very considerable time that he makes any claim against the defendant. There would not, therefore, have been any evidence as to the defendant's primary liability; and it seems quite plain that all that did go to the jury was, whether or not that conversation, which the plaintiff spoke to, did or did not take place between the plaintiff and the defendant; and the only question of law apparently intended to be reserved was, if that conversation took place, whether the promise was binding on the defendant, not having been in writing. We must now take it that the plaintiff, when he agreed to do the work, thought he had got the order of the board, but that he would not have done the work without, in addition to the order of the board through their chairman, the personal promise of the defendant himself that he would see him paid. The local board afterwards refused to pay, on the ground that they had not authorized the order. And the single point is, whether, when the defendant said, in effect, to the plaintiff, "You do the work for the local board, and I will see you paid," that is a promise to answer for the debt or default of another within s. 4 of the Statute of Frauds. The plaintiff contends for the original or primary liability of the defendant, or, at all events, that the defendant's liability is not a collateral liability within the statute, the objection being that the third person, the local board, could not be guilty of default, because there never had been any contract binding upon them, and therefore that the defendant could not be said to be answerable for the debt, default, or miscarriage of another person in the sense intended by the statute.

The passage cited from Chitty on Contracts (p. 475, 8th ed.) (1) favours this contention. I, however, take a contrary view. I think that the statute must be taken to apply to any contract of suretyship where there is an intention of guaranteeing the payment of a debt of another, and to require a writing wherever the contract, according to the intention of the parties, is a contract of suretyship. The enactment was aimed against what the legislature deemed the mischief of allowing a person to be fixed with liability for another by loose and idle talk; and the mischief, as it

(1) Given ante, p. 616.

1870

MOUNT-STEPHEN v. LAKEMAN.

seems to me, would be just as great in a case where there is only a supposed or expected liability in the original debtor as where there is an actual legal liability existing or afterwards contracted. The argument for the plaintiff amounts to saying, that if the original debtor shall turn out not liable the surety shall become absolutely liable, although he has not done the only thing which the legislature says shall fix him with liability. The legislature has enacted that a contract of suretyship shall not depend on the slippery testimony of words; but to hold with the plaintiff would be to permit the very mischief intended to be remedied.

There is little or no authority directly bearing on the point. In *Hargreaves* v. *Parsons* (1) it is said by Parke, B.: "The statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in some duty, by that other person towards the promisee." In the present case there was a supposed liability in the local board. The above language is equally applicable to the case of a supposed or expected liability or debt which never takes place, as to a debt to be and afterwards actually contracted. It seems to me, therefore, that the defendant's engagement was a promise within the statute; and this not being in writing, there was no evidence to go to the jury on the new count. As to the primary liability, there was, as I have said, no evidence which would have justified a verdict for the plaintiff. The rule must, therefore, be absolute to enter a nonsuit.

MELLOR, J. I am of the same opinion. The contract must be ascertained by the expressions used and the conduct of the parties. Now the expressions which the jury have found to have been used by the defendant amount to saying, "You must look to the local board and do the work for them, and if they don't pay I will pay you;" and the conduct of the plaintiff himself, as connected with the expressions used, fully bears this out; for when the work was done he sent in the account to the local board, and it is not till more than two years afterwards that he makes any application to the defendant. It is evident that there was no original liability intended on the part of the defendant. At first I was inclined

(1) 13 M. & W. at p. 570.

to think that, in order to be a debt or default within the statute, there must be an actual legal debt; but, on consideration, I think that would be too narrow a construction to put upon the statute, and one by which the object and principle of the statute would be defeated; because, all the mischief of allowing parol evidence would be let in as much in the one case as in the other. I therefore agree that the rule must be made absolute for a nonsuit, on the ground that there was no promise in writing.

LUSH, J. I am of the same opinion. The question is whether the promise of the defendant was a promise to be answerable for the debt, default, or miscarriage of another person within the 4th section of the Statute of Frauds, or whether the engagement which the defendant undertook was one by which he meant to incur primary liability. It was at first thought that in order that the promise should be within the statute there must be a debt of the third person actually existing at the time the promise was made; but it has been long since determined that a debt *to be* contracted is within the statute. The statute contemplates a debtor, a creditor, and a third person, the guarantor. Was the defendant here a debtor or surety only? It is clear that the defendant did not intend to incur a primary liability, and if the jury had so found, the verdict could not stand, as there is no evidence to support such a finding. What the defendant meant was to guarantee that the local board should pay for the work, who, it was contemplated, would employ the plaintiff. And it is clear that the plaintiff so understood what the defendant said, and accepted his engagement on that understanding. The defendant undertook that the debt which he and the plaintiff contemplated would be contracted by the local board should be paid; in other words, the defendant promised to be answerable for the debt or default of a third party, the local board. What the promise was at the time it was made it must continue to be, and if in its inception it was a contract of suretyship, it cannot be altered from a qualified or rather collateral promise into an absolute promise by what afterwards occurred, viz. the failure of the board to become a legal debtor. It was therefore a promise which the statute requires to be in writing, and there being no

1870

MOUNT-STEPHEN v. LAKEMAN.

writing, there was no legal evidence on which the jury could find for the plaintiff.

Rule absolute to enter a nonsuit.

Attorney for plaintiff: *G. E. Philbrick, for W. & C. Kitson, Torquay.*

Attorneys for defendant: *Church, Sons, & Clarke, for Francis & Baker, Newton Abbott.*

July 6.

LATTER *v.* WHITE.

Debtor and Creditor—Surety—Right of Creditor to Composition after disputing Validity of Composition Deed—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134) *ss.* 192, 198—*Estoppel.*

W. A. White entered into a composition deed, by which it was agreed that the creditors should accept a composition of 10s. in the pound, secured by the joint and several promissory notes of the defendant and White; the notes to be delivered seven days after the registration of the deed; the whole of White's estate to belong to the defendant, and to be realized for his benefit. The plaintiff agreed to assent to the deed and afterwards refused to be bound by it, on the ground that his assent had been obtained by fraud. The deed was duly registered according to the Bankruptcy Act, 1861, and the promissory notes were tendered to the plaintiff, but he refused to accept them. The plaintiff then brought an action for his debt against White; he pleaded the composition deed, which was a valid deed on the face of it, and the plaintiff replied that the assents were obtained by fraud. The action was referred, and the defendant being unable to prove the sufficiency of the assenting creditors, so as to satisfy the statute, consented that an award should be made by which the verdict should be entered in the plaintiff's favour. White was afterwards adjudged bankrupt. The defendant had realized White's estate. The plaintiff then brought an action against the defendant for the amount of the promissory notes given by the defendant for the composition due to the plaintiff under the deed:—

Held, by Cockburn, C.J., and Mellor, J., that the plaintiff was entitled to recover. By Lush, J., that the plaintiff, having successfully challenged the validity of the deed in an action, was estopped from alleging that the deed was binding upon him, and therefore that he could not recover.

Revd in Ex Ch 6 B. & S. 474

CASE stated by order of nisi prius.

The action was brought to recover the amount of three promissory notes and also in detenue to recover possession of the notes.

The facts of the case sufficiently appear in the head-note and judgments.

Ex Ch affd 4 B & S 578

June 10. *Day* (*Murphy*, with him), for the plaintiff.

J. Brown, Q.C. (*Sir G. Honyman, Q.C.*, and *G. Francis*, with him), for the defendant.

In addition to the cases referred to in the judgments, the following cases were cited: *Xenos* v. *Wickham* (1); *Cartwright* v. *Williams* (2); *Dell* v. *King* (3); Com. Dig., Election (C 2.)

Cur. adv. vult.

July 6. The Court having differed, the following judgments were delivered.

LUSH, J. This is an action upon three promissory notes alleged to have been given by the defendant to the plaintiff, for the payment respectively of 317*l.* 5*s.* 4*d.*, 423*l.* 0*s.* 6*d.*, and 317*l.* 5*s.* 4*d.* The notes are alleged to bear date on the 29th of November, 1867, and to be payable on the 1st of March, the 1st of June, and the 1st of September in the following year. There are also counts in detinue for the recovery of the notes themselves.

The pleas to the first set of counts, besides denying the making of the notes, and that the plaintiff was the lawful holder at the time of action brought, set up that one William Alfred White was indebted to the plaintiff in 2115*l.* 2*s.* 3*d.*, and in consideration that the plaintiff would accept a composition of 10*s.* in the pound upon the debt, and release White therefrom, the defendant agreed to become surety for him; that in pursuance of that agreement, and for the purpose only of securing payment of the composition by White to the plaintiff, the defendant made the notes; and that afterwards and before either of them became due, the plaintiff refused to accept the composition or release White from the debt, and that except as aforesaid there never was any value or consideration for the notes. Issue was taken on this plea.

The sixth plea set out a composition deed made in pursuance of the resolution of a meeting of creditors of William Alfred White (the plaintiff being present and assenting) whereby 10*s.* in the pound was agreed to be accepted in full, and the notes of the defendant and William Alfred White taken for the payment thereof by three instalments. By the deed William Alfred White

(1) 13 C. B. (N.S.) 381; 31 L. J. (C.P.) 361.

(2) 2 Stark. 340.

(3) 2 H. & C. 84; 33 L. J. (Ex.) 47.

1870

LATTER v. WHITE.

covenanted that he would, within seven days after its registration in the Court of Bankruptcy, deliver to certain trustees, parties thereto, the joint and several promissory notes of himself and the defendant as surety for the instalments. And the defendant covenanted that in case William Alfred White made default in meeting any of the notes at maturity he would immediately upon such default pay the same. The plea then alleged that the defendant in the belief that the deed was valid and binding upon all the creditors whether assenting or dissenting, and in consideration that the plaintiff would execute the same, and accept the composition and release White, made the notes and delivered them to the trustees named in the deed who still held them; that the plaintiff withdrew his assent to the resolution and agreement, and refused to execute or accede to the deed or accept the composition, and brought an action against William Alfred White for the full amount of the debt, and although he pleaded the deed the plaintiff obtained a verdict against him, the deed being bad and not binding upon dissenting creditors; and that afterwards White became bankrupt. To this plea the plaintiff, besides a traverse, replied that the deed contained a proviso that "although as between the debtor and the defendant, the latter was only a surety, nevertheless as between the defendant and the creditors he should be deemed and taken as a principal debtor (so far as regards the payment of the notes) so that he should not be discharged from liability under his covenant by reason of time being given to or any arrangement made with the debtor without the consent of the surety, or by reason of any other circumstances which would or might have the effect of discharging him from such liability if he were surety only and not a principal debtor. The sixth plea and the above replication were severally demurred to.

By agreement between the parties, the record which had been entered for trial was withdrawn, and the following facts stated for the opinion of the Court.

William Alfred White, being indebted to an amount exceeding 78,000*l.*, called a meeting of his creditors, and proposed terms of composition. The plaintiff, a creditor to the amount of 2115*l.* 2*s.* 3*d.*, attended, and signed, with the others, minutes of the resolutions agreed upon.

1870

LATTER v. WHITE.

These resolutions, dated the 29th of November, 1867, were—

1. That the creditors accept a composition of 10*s.* in the pound upon and in full satisfaction of their respective debts (as proveable in bankruptcy) payable by instalments of 3*s.* in the pound in three months, of 4*s.* in six months, and 3*s.* in nine months, secured by the joint and several promissory notes of William Alfred White and the defendant. The notes to be made and deliverable to trustees for the creditors within seven days after the registration of the deed after mentioned.

2. That a proper deed of composition, containing a release and all usual covenants be prepared and executed by or on behalf of each creditor.

3. That creditors acceding to the resolution shall not be prejudiced as to any securities or liens to which they may be entitled, nor as to their rights as against third parties.

4. That such deed shall be a deed or instrument of composition within the meaning of the 192nd section of the Bankruptcy Act, 1861, and in the meantime and until such deed shall be executed, these resolutions shall be binding on all parties thereto, and shall be a memorandum or instrument of composition within the meaning of the said 192nd section and be registered accordingly.

The defendant was induced to make the offer of securing 10*s.* in the pound by an arrangement made at the meeting, that the assets of the estate of William Alfred White should belong to the defendant and be realized on his behalf by William Alfred White, and the proceeds handed to the defendant. A deed (which it is not denied was in conformity with the resolution) was prepared, and on the 16th of December, 1867, executed by William Alfred White and by the defendant.

On the 17th of December the plaintiff's solicitors wrote to the solicitors of William Alfred White a letter stating that the plaintiff had lately discovered that the statement of account or balance sheet laid before the creditors was incorrect in several particulars, and that as he had assented to the arrangement proposed by the defendant upon the faith of the correctness of the balance-sheet, he withdrew such consent, and declined to be bound by it, and intended to take legal proceedings against William Alfred White for the recovery of his debt.

1870

LATTER v. WHITE.

The solicitors of William Alfred White replied on the same day that the accounts were prepared impartially as between the debtor and the creditors by an accountant, and checked by a committee nominated by the creditors, and that neither they nor the defendant could be held responsible for any inaccuracy, adding, "The deed of composition is sufficiently executed to bind your client and will be registered to-morrow."

On the following day, the 18th of December, the deed was registered and the promissory notes for payment of the composition to the different creditors, and amongst others to the plaintiff, were within seven days afterwards delivered to the trustees.

William Alfred White thereupon proceeded to realize the assets, and handed them over from time to time to the defendant.

On the 24th of December a circular was sent to all the creditors (including the plaintiff), announcing that, in pursuance of the deed executed and duly registered, the promissory notes had been delivered to the trustees, and might be had by the creditors entitled thereto, on application at any time.

The notes in question were dated the 29th of November, 1867, and were for payment of the several instalments to the plaintiff at three, six, and nine months, and signed by William Alfred White and the defendant.

On the 6th of February, 1868, the plaintiff commenced an action in this Court against William Alfred White upon an acceptance to his draft for 1196*l.* 3*s.* 6*d.*, dated the 2nd of November, 1867. White pleaded the deed, and that all conditions had been performed and things had happened to make it binding on the plaintiff. Issue was taken on the plea, and a second replication pleaded, alleging that divers of the creditors who in writing assented to the deed were induced to do so by the fraud of William Alfred White, and that, without the creditors who were so induced, the requisite majority did not assent thereto. Issue was taken on the replication.

On the 27th of February, 1868, between the date of plea and the replication, the notes in question were tendered to the plaintiff, and refused.

The action was ultimately referred to arbitration. After several meetings, the counsel for the defendant, William Alfred White,

having called certain witnesses, declined giving any further evidence in support of his plea, admitting that he could not succeed in his defence, and then, viz., the 8th of January, 1869, consented that an award should be made in the plaintiff's favour, and that the costs of, and occasioned by, the replication should be taxed and paid as part of the plaintiff's costs in the cause. The award was made accordingly on the 30th of January, 1869, and the verdict ordered to be entered for the plaintiff for 1196*l.* 3*s.* 6*d.* and costs, and White was ordered to pay the costs of the reference and award. The plaintiff took up the award. Nothing is stated in the case to account for the difference between the 2115*l.* 2*s.* 3*d.* for which the plaintiff signed the resolution of creditors, and the 1196*l.* 3*s.* 6*d.* claimed in the action. Possibly the balance might have been secured and obtained from other parties. However that may be, it was assumed throughout the argument, and must be taken as a fact, that the 1196*l.* 3*s.* 6*d.*, the amount of the acceptance, formed part of the debt of 2115*l.* 2*s.* 3*d.* for which the plaintiff then agreed to accept the composition, though the bill had not arrived at maturity when the resolutions were signed.

The whole of the assets of William Alfred White, except book-debts, were realised and handed over to defendant before the 3rd of December, 1868. On the last-mentioned day an indenture was executed between William Alfred White of the first part, the defendant of the second part, and one Carr of the third part, whereby, in consideration of 300*l.*, William Alfred White, with the privity and concurrence of defendant, assigned the book-debts absolutely to Carr.

All the creditors, except the plaintiff and one other, accepted the composition notes. The payments made by the defendant exceeded, by upwards of 4000*l.*, the amount of assets received. He also gave up his own debt of 12,290*l.*

On the 7th of January, 1869, the defendant gave notice to the trustees not to deliver the notes to the plaintiff or the other dissentient creditor, and required their delivery to himself.

On the 1st of March, 1869, William Alfred White was adjudicated a bankrupt on his own petition.

On the 16th of April, 1869, long after the last of the notes became due, the plaintiff demanded them of the trustees. They

1870

LATTER v. WHITE.

refused to give them up, by reason of the notice served on them on the 7th of January preceding. Thereupon the present action was brought.

Grave objections of a technical kind were urged in the course of the argument against the plaintiff's succeeding upon either of the counts in the declaration; but I do not propose to give any decision upon these points, because I am of opinion that the defendant is, upon substantial grounds, entitled to the judgment of the Court.

Were it not for the assumed effect of the clauses of the Bankruptcy Act, 1861, the case would be one of the most elementary character.

The defendant proposed to become surety for payment of 10s. in the pound, provided the plaintiff would accept it in full, and discharge the principal debtor. The plaintiff at first agreed to do so, but afterwards changed his mind, refused to come into the composition, sued the debtor, and obtained judgment for his debt, and then sought to resort to the surety, whose engagement he had refused to accept. If these had been all the circumstances, the case would have been too clear for argument. But it was urged that the plaintiff, by virtue of the 192nd section of the Bankruptcy Act, 1861, was in a position from which he could not recede, and was bound to accept the composition, whether he would or not, and therefore that his refusal went for nothing; and, further, that the judgment which he obtained against the principal debtor was inoperative, inasmuch as by the 198th section he was precluded from issuing execution upon it without leave of the Court of Bankruptcy.

This argument is based upon the assumption that the deed of composition was a valid deed binding upon the dissentient creditors, although this is not found as a fact. The other members of the Court are, I believe, of opinion that enough appears upon the case to enable them to hold that it was. I regret my inability to concur in that view. There is, undoubtedly, strong evidence in favour of the deed, but I cannot say it is conclusive, and no power is given to us to draw inferences. It may be, consistently with all that is stated, that the debts of the assenting parties were greatly exaggerated, so as to fall short of the required proportion, or that the

fraud imputed by the plaintiff in his replication was practised in order to obtain their concurrence. If there was no other answer to the argument, I should, therefore, desire that the case should be sent back in order to have that fact ascertained. But I do not think it necessary to do so, for I think that the plaintiff is estopped from now alleging that the deed was binding upon him. I do not say that he might not, at any time before he had altered the position of the parties, have retracted his dissent, and returned to his former status as a compounding creditor; but I think it is too late to do so now. He has challenged the validity of the deed in an action, and has obtained a verdict and judgment in his favour, which affirm that the deed was not duly executed so as to bind him. The relation between the two is thereby conclusively fixed and determined. Both the plaintiff and William Alfred White are estopped from averring the contrary of what has been so found by verdict. Neither can say, as against the other, that the deed is a valid deed. The plaintiff cannot sue William Alfred White for the notes, on the ground that he is a compounding creditor; nor can White claim to be relieved from the judgment upon paying the composition. To escape from this difficulty, Mr. Day contended that the plea was bad, inasmuch as the deed did not contain an absolute release; and therefore, if the verdict had been the other way, the plaintiff would have been entitled to judgment non obstante veredicto. I need not consider what the effect would have been if that contention were well founded, for I am of opinion that a release is not essential to a composition deed. Such a deed is itself a good bar as to all the creditors who were parties to it; and, as the Act places a non-assenting creditor in the same position as those who assented, the plea, which set up a deed executed by the requisite majority, with averments of performance, or readiness to perform, was a valid plea: *Garrod* v. *Simpson*. (1)

If then the plaintiff has precluded himself from claiming under the deed as a compounding creditor, how can he recover the composition from the surety, whose contract is only with those who are actually or constructively parties to the deed?

Reliance was placed upon the proviso in the deed, which is in these terms: "Provided always, and it is hereby agreed and

(1) 3 H. & C. 395; 34 L. J. (Ex.) 70.

1870

LATTER v. WHITE.

declared, that although as between the said debtor and the said surety he, the said Alfred White, is only a surety, nevertheless as between the said surety and the said creditors, he, the said surety, shall be deemed and taken as a principal debtor (so far as regards the payment of the said promissory notes so signed by him as aforesaid), so that he, the said surety, shall not be discharged from his liability under his aforesaid covenant by reason of time being given to, or any arrangement being made, with the said debtor without the consent of the said surety, or by reason of any other circumstances which could or might have the effect of discharging him, the said surety, from such liability, if he were a surety only and not a principal debtor."

It is clear that this proviso was meant to operate upon the suretiship. It is an agreement between the surety and "the creditors" named in and contemplated by the deed, namely, the compounding creditors, an agreement which enlarges the obligation of the surety and places him in the position of principal debtor, quoad the composition which he undertakes to answer for. But as the plaintiff refused to become a compounding creditor and to accept the suretiship, the defendant never came under an obligation to him. There was no contract between the two, and therefore the terms of discharge have no application to the case.

Another argument was founded upon the fact that the defendant had received the assets, and Mr. Day contended that as this was done by arrangement with the creditors, it formed part of the consideration for the notes, and therefore the consideration had not wholly failed. But this argument appears to me to be utterly fallacious. The consideration for the notes was the acceptance of 10*s.* in the pound in full discharge of the debt. The relinquishment of the assets to the defendant, supposing that could be deemed a consideration moving from the creditors, was the act of those who assented. Those who, like the plaintiff, dissented from the arrangement were no parties to the transfer, and if they were deprived of their recourse to the assets, they were deprived of it not by any act of their own, but against their will. Whether, if there had been any surplus in the defendant's hands, the plaintiff might have reached that surplus by any proceedings in equity, it is useless to consider.

The question before us is whether the defendant is liable to pay the composition notes, and, for the reasons I have stated, I am of opinion that he is not.

MELLOR, J. In this case an action had been brought by the plaintiff, Lawrence Latter, against Alfred White, for the detention of certain promissory notes, and also to recover the amount of such promissory notes, in separate counts of the same declaration.

There were pleas denying the detention of the notes, and the property in the plaintiff, and also denying the making of the notes, and that the plaintiff was the holder, and also various special pleas, setting up certain of the matters hereinafter mentioned by way of defence to the action, upon which issues were taken, and upon the trial the cause was, by consent of the parties, referred to an arbitrator, to state a special case; and we have to decide, upon the facts stated, whether or not the plaintiff is entitled to recover the amount of his claim, either on the count in detinue, or the count in assumpsit.

It appears that the plaintiff was a creditor of one William Alfred White (a son of the defendant), who carried on business as a hop and seed merchant: and that William Alfred White, being unable to pay his creditors in full, called a meeting of the creditors, at which, after a statement of the son's affairs had been submitted, the defendant (his father) offered to secure to the creditors of W. A. White a dividend of 10*s.* in the pound, on the amount of their debts, in consideration of such creditors assenting to and becoming parties to a deed of composition to be entered into between W. A. White, the defendant, and the creditors of W. A. White, and releasing the latter from all claims which they might have against him. It further appears that the defendant was induced to make the offer by an arrangement that the estate of W. A. White should belong to him, and be realized for his benefit. This offer was formally laid before the creditors at a meeting held on the 29th of November, 1867, at which plaintiff was present.

At that meeting, formal resolutions were passed by the creditors to the effect that they accepted the composition of 10*s.* in the pound, payable by instalments, 3*s.* in three months, 4*s.* in six

1870

LATTER v. WHITE.

months, and 3s. in nine months, to be secured by the joint and several promissory notes of W. A. White and the defendant. The notes to be made and delivered to the trustees for the creditors within seven days after the registration of the deed therein mentioned, which was to be a deed of composition within the meaning of the 192nd section of the Bankruptcy Act, 1861; 24 & 25 Vict. c. 134.

The minute containing the resolutions was signed by the plaintiff and other creditors, and the arrangement was made with his assent. A deed of composition, dated 16th of December, 1867, was thereupon prepared and executed on that day by W. A. White and the defendant. On the 17th of December, 1867, the plaintiff's attorneys wrote a letter to the attorneys of W. A. White, alleging that the plaintiff had been induced to become a party to the arrangement on the faith of the statements contained in the balance sheet, and which he had discovered to be incorrect in material particulars; and they, on the plaintiff's behalf, withdrew his consent, and declined to be bound in any way by the arrangement. This letter was answered by the attorneys for W. A. White on the same day, explaining the mode in which the balance-sheet had been prepared, and denying that W. A. White was responsible for any inaccuracies therein; and the letter concluded as follows: "The *deed of composition is sufficiently executed to bind your client, and will be registered to-morrow.*

The deed referred to was, on the 18th of December, 1867, duly registered under the Bankruptcy Act, 1861, s. 192, and *within seven days W. A. White delivered to the trustees* named in such deed the several promissory notes, signed by W. A. White and the defendant for the amount of the several instalments upon the debts due to the various creditors of W. A. White in pursuance of the terms of the deed of arrangement and composition, and the trustees now hold the several promissory notes which represent the amount of the composition in respect of the plaintiff's debt.

On the 24th of December, 1867, a circular was sent to the various creditors of W. A. White, including the plaintiff, informing them that the promissory notes had been delivered to the trustees, and might be had at any time after that notice, on appli-

cation to Mr. Green, one of the trustees, at No. 11 Southwark Street, Borough. The promissory notes were afterwards tendered to the plaintiff, and refused by him.

On the 6th of February, 1868, the plaintiff commenced an action against W. A. White to recover the amount of a bill of exchange for 1196*l.* 3*s.* 6*d.*, dated the 2nd of November, 1867, and accepted by W. A. White, payable three months after date; and in that action W. A. White pleaded by way of defence the said composition deed, alleging that a majority in number, representing three-fourths in value of creditors of W. A. White, duly assented to or executed the deed, and also alleging due execution of the deed by the trustees and the defendant, and that the same was duly filed and registered according to the provisions of the Bankruptcy Act, 1861, and further alleging that the plaintiff became and was bound by the deed as if he had been a party thereto, and had duly executed the same, and alleging the due delivery of the promissory notes to the trustees under the deed.

The plaintiff joined issue on this plea; and by another replication alleged that the signature and assent of divers creditors to the deed had been obtained by fraud, and that by reason thereof the deed was rendered invalid as a deed of composition under the provisions of the Bankruptcy Act.

That action was at the trial referred, on certain terms, to an arbitrator before whom the parties appeared, and after certain witnesses had been examined on the part of W. A. White, his counsel declined to call more witnesses to support his plea of the composition deed, and consented that an award should be made for the plaintiff, directing that a verdict should be entered for him in the action for 1196*l.* 3*s.* 6*d.*, which was accordingly done by the arbitrator. The case further stated that *the proceeds of the estate of W. A. White were, as they were realized, handed over to the defendant* in pursuance of the arrangement to that effect. On the 7th of January, 1869, notice was served on the trustees under the deed of composition on behalf of the defendant, alleging that the promissory notes, which had been delivered to the trustees for the plaintiff, were null and void, and requiring them not to deliver the same to the plaintiff or any other person without the consent of the defendant.

Upon this state of facts the question arises, whether the plain-

1870

LATTER v. WHITE.

tiff, having withdrawn his assent from the composition and refused to execute or assent to the deed, and having taken proceedings, and recovered a verdict on his original debt against W. A. White, can now be entitled to his composition of 10s. in the pound under the terms of the deed, and to recover from the defendant the promissory notes or the amount thereof, which were handed to the trustees as before stated under the terms of the composition deed, and which are now detained by the trustees by the direction of the defendant, although demanded by the plaintiff. It was contended, on the part of the plaintiff, that nothing had happened to deprive him of his right to come in as a creditor under the deed of composition, assuming it to be a valid deed; and that, notwithstanding his withdrawal from the arrangement for the composition, and his declining to execute the deed, and bringing an action against W. A. White on his original debt, and recovering a verdict in such action, he was nevertheless bound by the deed as if he had assented to and executed the same by the operation of ss. 192 and 198 of the Bankruptcy Act, 1861; for although the counsel of W. A. White had before the arbitrator declined to call further witnesses in support of his plea, and had consented to an award in favour of the plaintiff (who had therefore recovered in the action, and conclusively established the amount of his debt from W. A. White), there was nothing in those proceedings which shewed that the deed was invalid or inoperative, and that, notwithstanding the verdict being found for the plaintiff in that action, the deed was nevertheless a good composition deed under the 192nd section of the Bankruptcy Act, 1861; and that by the effect of that section and of the 198th section of the same Act, the plaintiff would be prevented from issuing execution on any judgment in the action against either the goods or person of W. A. White without leave of the Court; and the case of *Wright* v. *Jelley* (1) was cited as an authority to that effect; and it was contended, therefore, that the plaintiff, by availing himself of his right to dispute the legal effect of a deed of composition to which he had not assented, although alleged to be bound by it, had not forfeited his right to come in as a creditor and take the composition, and demand the promissory notes, or payment of the amount thereof by the defendant.

(1) Law Rep. 4 Ex. 9.

The validity of the deed was hardly disputed by the counsel for the defendant. It is set out in the appendix, and forms part of the case, and has been duly registered under the provisions of the Bankruptcy Act, 1861, and it purports on the face of it to be a valid deed; and it further appears by the case that the defendant has received the entire benefit of the estate of W. A. White, on the faith of which he became a party to the deed. Moreover, in another deed, also set out in the appendix to the case, dated the 3rd of December, 1868, and made between W. A. White of the first part, the defendant of the second part, and one Andrew Thomas Carr of the third part, being an assignment of book-debts due to W. A. White (being part of his estate) for a sum of 300*l.* paid to W. A. White, with the assent of the defendant, it is expressly stated that the deed in question had been duly executed by a majority in number representing three-fourths in value of the creditors of W. A. White whose debts amounted to 10*l.* and upwards in value, and to have been duly registered according to the provisions of the Bankruptcy Act, 1861, and was meant and intended to have been a proper deed within the terms of the resolution of the 29th of November.

Under these circumstances, we are, as it appears to me, justified in coming to the conclusion that the deed in question was and is a deed binding upon the creditors of W. A. White, under the provisions of the Bankruptcy Act, 1861; and that, upon the true construction of the deed, and under the circumstances disclosed in the case, there is nothing to prevent the plaintiff, as a creditor bound by the deed, from claiming from the defendant the promissory notes so detained by his orders, or recovering the value thereof against the defendant.

The defendant's counsel argued that the plaintiff had absolutely and irrevocably elected, as between himself and the defendant, not to accept the composition, or the notes to which the defendant had become a party, for the purpose of securing to the creditors who would take it the due payment of the composition; and he contended that, whatever might be the rights of the plaintiff, as against W. A. White, yet as against the defendant, *who was surety only* for the due payment of the composition, he had entirely lost his right to claim the notes, or to recover the payment thereof

1870

LATTER v. WHITE.

from him, by refusing to accept the composition and the notes when tendered, and electing to pursue his remedy against W. A. White, the principal debtor. Now, by the terms of the deed to which the defendant was a party, and which recites the resolutions of the creditors with reference to the acceptance of 10s. in the pound, payable by instalments, to be secured by promissory notes, signed by the defendant and W. A. White, the defendant covenanted with the creditors of W. A. White, as follows:—"And the said surety, in pursuance of the agreement in that behalf, doth hereby for himself, his heirs, executors, and administrators covenant with the creditors, and each of them respectively, that in case the debtor (W. A. White), his executors, &c., shall make default in meeting any of the promissory notes at maturity, then, and in such case, he, the surety, his executors, &c., *will, immediately upon such default* being made, pay to the holder or holders of the notes, which shall not be paid as aforesaid, the full amount which shall be then due on such promissory notes respectively."

It was argued that this was a special bargain by the defendant, the surety, with the creditors, to pay immediately on default being made by the debtor in the payment of the notes at maturity, and that the plaintiff, having elected not to accept the terms of that bargain, and having refused to take the notes, the defendant was discharged from his covenant, and that, although the notes are overdue and unpaid, the plaintiff was no longer entitled to proceed against him, either for the recovery of the notes or the amount thereof. Now, it is to be observed that by the proviso which immediately follows the covenant of the surety, it is agreed and declared that, although as between the "debtor and the surety, he, A. White (the defendant) *is only a surety*, nevertheless as between the *surety and the creditors, he, the surety, shall be deemed and taken to be a principal debtor* (so far as regards the payment of the promissory notes so signed by him as aforesaid), so that he, the surety, shall not be discharged from his liability under his aforesaid covenant by reason of time being given to, or any arrangement being made with, the debtor, without the consent of the surety, or by reason of any other circumstances which would or might have the effect of discharging him, the surety, from such liability, *as if he were a surety only, and not a principal debtor.*"

I confess that I cannot appreciate the argument of the defendant's counsel, that the plaintiff, having withdrawn his assent to the arrangement for the composition, and refused to execute the deed and declined to take the notes, is for ever bound by that refusal, although *the effect of it is not to discharge him* from the operation and effect of ss. 192 and 198 of the Bankruptcy Act, 1861. The contention in substance amounts to this, that the plaintiff, having withdrawn his assent to the arrangement, and declined to execute the deed, or accept of the notes securing the due payment of the instalments, and having taken proceedings against the debtor (W. A. White) in which he recovered a verdict for the amount of his debt, but of which verdict he cannot avail himself by reason of the 198th section of the Bankruptcy Act, 1861, is, as a penalty upon his obstinacy, *neither to have execution for his debt*, nor *the benefit of the composition under the deed*. In other words, that he is no longer entitled to any benefit under it. If such be the effect of what has passed, the debtor, W. A. White, is, under the provisions of the Bankruptcy Act, 1861, discharged from his original debt to the plaintiff, and the surety is discharged from his liability, although neither he nor the debtor has paid the amount of the notes, and he, the defendant, has received the benefit of the realization of the assets of W. A. White's estate.

This is a somewhat startling proposition, and I confess it appears to me that none of the cases cited by Mr. Brown tend to support it. The present does not in the least resemble *Whelpdale's Case* (1), and the other cases relied in support of the argument; they proceeded on purely technical grounds, having no relation to an instrument like the present, which becomes binding on non-assenting as well as assenting creditors by the force of the provisions of a statute, and which offers no option to a creditor in the matter, but binds him to accept a composition in discharge of his original debt. In such a case, surely nothing short of payment can discharge the debtor or his surety, who, as between himself and the creditor, is declared to be a principal debtor.

It is also material to observe with reference to the cases relied upon by Mr. Brown, that the promissory notes in this case have actually been delivered to the trustees for the creditor (the plaintiff.)

(1) 5 Rep. 119.

1870

LATTER v. WHITE.

The covenant of the surety is, that in case the debtor shall make default in payment of the notes at maturity, he will immediately, upon such default, pay to the holder the full amount which the debtor shall have failed to pay. An angry creditor refuses to take from the trustees the notes which have been lodged with them for his benefit, but afterwards repents, and desires to have the notes, and to accept the composition. Can it be an answer to him to say, "You have once refused, and are therefore no longer entitled to the payment of the notes." I cannot think that such a result can flow from such premises, and, were it possible, it would in this case lead to singular results.

The surety has got possession of the debtor's estate, which is being, or has been, realized for his benefit; and yet, according to the argument of Mr. Brown, he will obtain his discharge from obligations which he undertook upon that very consideration.

I think, therefore, that we must assume that the deed in question is a valid deed, and that the plaintiff is by virtue of it deprived of any other benefit as the result of his being a creditor of W. A. White, than the composition provided for by such deed; and that his refusal to assent and his suing the original debtor do not amount to an irrevocable election not to accept the provision made by the deed; and that he was entitled to a locus pœnitentiæ, and may now demand the payment of the composition of 10*s.* in the pound under the deed.

These observations appear to me to dispose of the real argument put forth by Mr. Brown, who scarcely objected to the form of action, or set up any defence on the part of the defendant arising from the notes being still in the hands of the trustees under the terms of the deed; and there can be little doubt that the trustees are now withholding the notes from the plaintiff by the express directions of the defendant, and, therefore, probably no useful purpose could be served by urging an objection which was anticipated by the plaintiff's counsel, but upon which it is not necessary for me to say anything.

I am therefore of opinion that our judgment should be for the plaintiff.

COCKBURN, C.J. The pleadings and facts have been so carefully

1870

LATTER v. WHITE.

and sufficiently stated by my learned Brothers, who have preceded me, that nothing could be gained by my again going over the same ground.

I agree with my Brother Mellor in the opinion that the deed on which this action is founded must be taken to be a valid and binding composition deed. It is true that in the proceedings upon the reference in the action brought by the plaintiff against William Alfred White, the counsel for the defendant either abstained from proving, or was not in a condition to prove, the sufficiency of the assenting creditors, so as to satisfy the statute, and a verdict was consequently entered for the plaintiff on the ground that the defendant had failed to establish the plea which set up the composition deed in bar of the action. But the documents to which my Brother Mellor has referred, and the whole history of the case, satisfy me that the deed was sufficiently executed, so as to satisfy the requirements of the statute, and therefore is a good and valid deed. It follows that the plaintiff, though a non-assenting creditor, is, by force of the statute, bound by it. It was through the default of W. A. White, the defendant in the action, in failing to prove what was necessary to give effect to the deed, that a verdict passed for the plaintiff. And notwithstanding such verdict, the plaintiff can obtain no fruits from it; for by the express enactment of the statute he is precluded from taking out execution except by leave of the Court of Bankruptcy, leave which that Court would assuredly not give if the true view of this matter be, as I think it is, that the deed is a valid and binding deed. For the policy of the law undoubtedly is to make the smaller number of creditors yield to the larger, and to insure the administration of an insolvent's estate according to the views of the majority, so as to avoid litigation and a wasting of the estate, and to insure an equal distribution among all the creditors.

The deed being thus binding on the plaintiff by the effect of the statute, it follows that, while subject to the restraint which it imposes on his former rights, he must be entitled to all the advantages which it confers. If so, the right to have the promissory notes, according to the terms of the deed, and to be paid the amount of them, secured to the assenting creditors by the deed, and to the non-assenting creditors by virtue of the statute, the plaintiff is entitled to the benefit of the covenant.

1870

LATTER v. WHITE.

But it is said that the plaintiff, having brought his action against the principal debtor, and having recovered a verdict as against the deed for the full amount of his debt, is estopped from now setting up the validity of the deed. In this view I cannot bring myself to concur.

Let us first consider the question with reference to the principal debtor. It must be admitted that a non-assenting creditor who brings an action to test the validity of a composition deed and is defeated, will not be excluded from the benefit of the deed by reason of his having brought such action. Otherwise, no non-assenting creditor could try the validity of such a deed except at the peril of forfeiting his claim altogether. Why, then, should a creditor, who brings such an action, and who succeeds only by reason of the debtor failing to prove the sufficiency of the deed, the deed being all the time a valid one, be in a worse position, seeing that, by reason of the validity of the deed, he is deprived of the means of obtaining the fruits of his verdict?

It is obvious that, if such a proposition were once established, it would be in the power of a debtor, on an action being brought to try the validity of a compensation deed, to fail designedly to prove its sufficient execution, and so to allow the creditor to get a verdict, while he might afterwards avail himself of the deed to prevent execution.

It may be said that, under such circumstances, the Court of Bankruptcy would allow execution to issue. But of what avail would that be, if, as is common in these cases, the estate of the debtor has been made over to trustees for the benefit of the creditors, and the estate has been distributed under the deed? Of what use would it be in the present instance, where, by an arrangement subordinate to the composition deed, the entire estate of the debtor has been made over to the surety, the defendant in the present action? I am therefore of opinion that there was here no estoppel as between the plaintiff and the principal debtor.

Then, is there any estoppel between the creditor and the surety? I think not. On the assumption that the deed is a valid deed, and binding on the non-assenting creditor, the position of the surety is in no respect prejudiced, seeing that the non-assenting creditor has no greater power over the estate of the debtor than he would have

had if he had been defeated in his action against the principal. The creditor being barred of his remedies against the estate of the debtor, all that the surety intended to secure by the deed is effected, and, practically, neither his position, nor that of the principal debtor, is in any way prejudiced.

No doubt, if this were an ordinary deed, the covenant of the defendant would fail to take effect. For, being founded on the corresponding engagement of the plaintiff to be a party to the composition, on the refusal of the plaintiff to execute the deed, the whole arrangement would fall to the ground. But the deed is not an ordinary one. The consideration for the defendant's covenant does not fail, as the deed was intended to take effect, and did take effect, as a composition deed under the 192nd section of the Bankruptcy Act, 1861, and, therefore, by force of the statute the plaintiff becomes, in spite of himself, an assenting party to the deed. The contract contained in such a deed must be taken to be made, both by the principal and the surety, not only with the creditors executing the deed, but also with those who, on the execution of the deed by the necessary creditors, became virtually parties to it. The consideration for the covenants entered into must be taken to be that all the creditors shall become parties to, and be bound by, the deed. If the necessary number of creditors do not execute, so as to bind the rest, the consideration fails, and the deed becomes inoperative. But if the deed is executed so as to bind the non-assenting creditors, it would certainly be, as it seems to me, inconsistent with the contract, as well as inconsistent with common justice, that, as against a creditor who has by the effect of the deed lost his remedies against the estate of the debtor, the surety, who has bound himself to satisfy the creditors according to the terms of the compromise, shall be freed from the fulfilment of his engagement because the creditor has made an ineffectual attempt to overthrow the deed.

I think that he is not so freed, and I therefore agree with my Brother Mellor, that our judgment should be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *West & King.*
Attorney for defendant: *C. P. Pritchard.*

1870
June 7.

WEBB AND OTHERS *v.* THE COMMISSIONERS OF HERNE BAY.

Estoppel—Debenture, Assignee of—Illegality of Contract—Mandamus.

A body corporate, having issued debentures, which are assignable, and purport to have been executed pursuant to powers conferred by statute, is estopped from alleging against an innocent assignee for value that the debentures have been issued illegally and in contravention of the statutory powers; and the assignee may by action of mandamus compel the body corporate to apply its funds to liquidate the interest due on the debentures, as required by their Act of incorporation.

Commissioners were incorporated by statute for the purpose of improving the town of H., and were empowered to levy rates, and to borrow money. For securing the payment of the loans made to them they were authorized to issue in a prescribed form debentures, bearing interest and capable of assignment. A person being a commissioner was forbidden under a penalty to accept any contract for carrying out the objects of the statute. The commissioners bought bricks for the purposes of the Act from P. H., a commissioner; and in order to provide for payment of the bricks they executed and delivered to him debentures in the prescribed form, which were duly registered as required by the Act. P. H. assigned them to the plaintiffs for value without notice of the circumstances under which they were issued. The commissioners having made default in payment of the interest due upon the debentures:—

Held, assuming the transaction to have been illegal, that, as the commissioners had issued the debentures knowing that they might be assigned, they were estopped from alleging that the debentures had been illegally issued; and that the plaintiffs were entitled to maintain an action of mandamus to compel the commissioners to apply their funds in payment of the interest.

AN action commenced by writ, with an indorsement that the plaintiffs intended to claim a writ of mandamus to command the defendants to apply all money raised, or to be raised, under or by virtue of 3 & 4 Wm. 4, c. cv., in the manner prescribed by s. 123 of that Act.

At the trial a verdict was taken for the plaintiffs, subject to a case.

1. The defendants are a body corporate incorporated by 3 & 4 Wm. 4, c. cv., an Act for paving, cleansing, lighting, watching, repairing, and improving a certain portion of the parish of Herne, in the county of Kent.

2. By s. 109 the commissioners were empowered to raise and levy from time to time such sum of money as they might think requisite by a rate or assessment to be made and levied under the

name and description of the "Repairing, Lighting, and Watching Rate."

3. By s. 119 the commissioners were empowered from time to time to borrow at interest any sum of money upon the credit of the rate or assessment authorized to be made; and in the event of the same sum of money, or any part thereof, being repaid by the said commissioners, to borrow at interest in like manner any other sum of money, and so on, toties quoties; but so, nevertheless, that there should not be owing upon the security at any one time more than the aggregate sum of 5000*l.* And it was enacted that every such mortgage security should or might be in the words or to the effect provided by the Act.

4. By s. 120 it was declared lawful for the holder of a security to transfer it in the form provided by the Act.

5. By s. 121 the holder of the security was entitled to his quota of the rate in proportion to the annual amount of the interest due on the mortgage without priority.

6. By s. 123 it was enacted that the money to be raised by the rate, or on the credit thereof, should, in the first place, be applied in defraying the costs of obtaining the Act, then in paying the interest of the several sums of money borrowed on the credit of the rate, then in executing the several works by the Act directed to be done, and then in reducing, paying off, and discharging the several principal sums of money that might be from time to time borrowed on the credit of such rate.

7. The plaintiffs are assignees and transferees for value of six mortgages or securities upon the credit of the rate of 100*l.* each, bearing interest at 5*l.* per cent. per annum. These mortgages were granted to David Halket under the circumstances hereinafter appearing, of which circumstances the plaintiffs' testator and the plaintiffs had no notice. These mortgages were, with other securities, deposited with the testator, from whom the plaintiffs derived their title in 1836, to secure the sum of 4000*l.* and interest. Upon Halket's bankruptcy in 1859 these bonds were valued at 75*l.*, and were transferred by a deed which states the sum of 75*l.* to be the consideration of the transfer; but after realizing all the securities a considerable balance of the 4000*l.*, exceeding the sum of 600*l.*, remained due. Such mortgages and the transfers of

1870

WEBB v. HERNE BAY COMMISSIONERS.

them to the plaintiffs are all in the form prescribed by the Act, and were duly registered (1) after they were respectively executed, and the mortgages had the common seal of the commissioners affixed in the presence of five commissioners who signed the mortgages. In no case was the said David Halket one of the said five commissioners.

8. David Halket was and acted as a commissioner at the time of the execution and granting to him of the six mortgages, and he was a brick and tile manufacturer.

9. It appears by the minute-book of the proceedings of the commissioners, which was to be taken as correctly representing what took place at the meetings of the commissioners, that on the 11th of April, 1835, at a meeting of the commissioners, at which David Halket, with five others, was present, it was resolved, that the offer of Halket to sell to the commissioners 125,000 bricks at 1*l.* 12*s.* per 1000, to be secured by debentures, be accepted, and that the clerk do prepare such debentures accordingly; and that on the 5th of August following, at a meeting of the commissioners, at which Halket was present with five others, it was resolved that the meeting do seal and approve by the signature of five commissioners present certain debentures, and amongst them two to Halket, viz., Nos. 19 and 20, each for 100*l.*, and the same having been done, the clerk was directed to register the same and hand them over to their respective owners.

10. It further appears by the said minute-book, that on the 17th of August, 1835, at a meeting of the commissioners, at which Halket was present, with five others, it was resolved that the clerk do prepare, by the next meeting, a debenture of 100*l.* to Halket, on account of work done by Ambrose Hickins, and that three additional debentures be prepared to David Halket in further discharge of his account for bricks amounting to 427*l.* 4*s.*, and David Halket engaged to furnish bricks at 1*l.* 12*s.* per 1000, to increase the amount of his claim to 500*l.*, and that on the 14th of September, 1835, at a meeting of the commissioners, at which David Halket was present, with five others, it was resolved that this meeting do seal and approve, by the signatures of five commissioners present, four debentures to David Halket,

(1) See s. 122 in the judgment of Blackburn, J., post, p. 653.

and the same being done, that the clerk be directed to register the same and hand them over to the owners.

11. Halket did before the 14th of September, 1835, supply bricks to the said commissioners to the value of 500*l.*, and Ambrose Hickins was a contractor to execute a culvert and other works for the commissioners to the amount of 1237*l.*, and he was also a debtor to Halket in the amount of 100*l.* for bricks supplied to him, Ambrose Hickins, by Halket, and he agreed to receive payment of the said sum of 1237*l.* in 937*l.* in cash, and in three of the mortgages of 100*l.* each, and Ambrose Hickins, by writing, dated the 8th of August, 1835, directed the commissioners to grant one of the said mortgages of 100*l.* to David Halket, Halket having arranged with the said Ambrose Hickins to take one of the mortgages of 100*l.* in satisfaction of the debt of 100*l.* due to him from the said Ambrose Hickins.

12. The two bonds granted to Halket on the 3rd of August, 1835, together with the four bonds granted to him on the 14th of September, 1835, as mentioned in the 9th and 10th paragraphs, are the six bonds transferred to the plaintiffs as aforesaid, and the subject of the present action.

No money actually was paid by Halket or Hickins to the commissioners.

14. The six mortgages so granted to Halket were duly transferred to the plaintiffs on the 5th of May, 1859.

15. Before the 5th of May, 1859, the costs, charges, and expenses of applying for and incident to the obtaining and passing of the Act, and of all interest upon money advanced for that purpose had been paid partly in cash, and as to 600*l.* residue thereof by six debentures similar to those granted to Halket, but neither before the 3rd of August, 1835, nor since, has any money been raised or received by the said commissioners applicable for reducing, paying off, or discharging the principal sums of money borrowed on the credit of the rate or any part thereof, and such principal sums and the mortgages granted for the same have never been released or discharged.

16. Since the 5th of May, 1859, the commissioners have in every year raised and received, by virtue of the Act, under and by virtue of the repairing, lighting, and watching rate money,

1870

WEBB v. HERNE BAY COMMISSIONERS.

sufficient to pay the interest of the several sums of money borrowed on the credit of the rate, and of the mortgages granted in respect thereof, including the mortgages hereinbefore mentioned and referred to, but the commissioners had not paid any interest on any of the mortgages but had applied the money so raised and received in executing the several works by the Act directed to be done. The moneys received have never been more than sufficient to defray the costs of executing the several works.

19. At the time of the service of a demand for payment the commissioners had in their hands £2 11*s.* 0*d.*, money arising from the rates and applicable under the Act to the purposes thereby prescribed, and since that date and before the commencement of this action had received further moneys so applicable, and they refused to pay any interest to the plaintiffs on the mortgages.

The Court was to be at liberty to draw inferences of fact.

The questions for the opinion of the Court were :—

1st. Whether the plaintiffs are entitled to recover in this action any, and if so, what sum as damages in respect of arrears of interest on the six mortgages or any of them.

2nd. Whether the plaintiffs are entitled to a writ of mandamus in the form endorsed on the writ. (1)

(1) The mortgages were in the following form :—[After reciting the title, &c., of the above Act :] "We, the commissioners, acting in the execution of the said Act, in consideration of the sum of 100*l.* advanced and lent by David Halket, of &c., upon the credit and for the purposes of the said Act, and paid by him to the treasurer to the said commissioners, do hereby grant and assign unto the said David Halket, his executors, administrators, and assigns, such proportion of the rate or assessment authorized to be raised, levied, and collected by virtue of the said Act, under the name or title of 'The Repairing, Lighting, and Watching Rate,' as the said sum of 100*l.* doth or shall bear to the whole sum to be borrowed, and which shall from time to time be owing, upon the credit of the said rate or assessment, to be had and holden from the day of the date of these presents until the said sum of 100*l.* with the interest for the same from the 24th day of June last past after the rate of 5*l.* per centum per annum, to be paid half-yearly, shall be fully paid and satisfied. In witness whereof we have set our common seal, this 3rd day of August, in the year of our Lord, 1835."

3 & 4 Wm. 4, c. cv. s. 10, enacts, amongst other disqualifications, that "no person shall be capable of acting as a commissioner in the execution of the Act who shall . . . have any share or interest, either directly or indirectly, in any bargain or contract under the Act . . . and no person, during the time he shall be such commissioner, shall be

1870

WEBB v. HERNE BAY COMMISSIONERS.

June 3. *Pollock, Q.C.* (*Bridge* with him), for the plaintiffs. First, the form of writ demanded is the proper form, it being shewn that there are funds in the hands of the commissioners: *Cane* v. *Chapman* (1); and the plaintiffs are, primâ facie, entitled to it. But it will be said on behalf of the defendants that the bonds are illegal or void, as not being for the purposes nor within the powers of the statute. There are several answers to this; but conceding that the debentures might not be enforceable by an original holder with knowledge of their invalidity, the defendants are estopped as against the plaintiffs, by the recitals in the bonds themselves from disputing that they were given for legal purposes: see notes to *Duchess of Kingston's Case.* (2) *Hill* v. *Manchester Waterworks* (3) is a stronger case than the present, as the bond there was in the hands of the original obligee with notice.

[LUSH, J., referred to *Chambers* v. *Manchester and Milford Ry. Co.* (4).]

There the bond was an absolute nullity, the company having no power to give any such bond, and it was in the hands of the original obligee. *Horton* v. *Westminster Commissioners* (5) is directly in point for the plaintiffs.

June 7. *Sir George Honyman, Q.C.* (*Philbrick* with him), for the defendants. There is no estoppel in this case. All the cases cited on the other side are distinguishable. Not one of them decides that where the transaction is illegal and void there is an estoppel. *Bowman* v. *Taylor* (6) decides only that, where the parties to a contract assert a thing to be part of the contract, it is not competent for one of the parties afterwards to deny it. *Hill* v. *Manchester Waterworks* (3) is the case of a private trading company formed for the purpose of making a profit, and the plea was held bad for not alleging that the borrowing was in fraud of the share-

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capable of taking or entering into any such bargain or contract, nor shall any commissioner act in any matter in which he shall be personally interested." Sect. 11 imposes a penalty of 50*l.* upon any person acting as commissioner in contravention of s. 10.

(1) 5 Ad. & E. 647.
(2) 2 Sm. L. C. 6th ed. 779.
(3) 2 B. & Ad. 544.
(4) 5 B. & S. 588; 33 L. J. (Q.B.) 268.
(5) 7 Ex. 780; 21 L. J. (Ex.) 297.
(6) 2 A. & E. 278.

1870

WEBB v. HERNE BAY COMMISSIONERS.

holders. In *Horton* v. *Westminster Commissioners* (1) the doctrine of estoppel is thus explained by Martin, B.: "The meaning of estoppel is this—that the parties agree, for the purpose of a particular transaction, to state certain facts as true, and that, so far as regards that transaction, there shall be no question about them. But the whole matter is opened where the statement is made for the purpose of concealing an illegal contract; for persons cannot be allowed to escape from the law by making a false statement." Those remarks are most apposite to the present case. It is clear that illegality may be pleaded to a deed: *Collins* v. *Blantern.* (2) In principle, the present case cannot be distinguished from *Foster* v. *Taylor.* (3) In *Stevens* v. *Gourley* (4) it was held to be a good answer to an action for work and labour that the building, in respect of which the work and labour was done, was erected in contravention of the provisions of the Metropolitan Building Act, 18 & 19 Vict. c. 122. In that case *Foster* v. *Taylor* (3) was recognized as law. So a broker not duly licensed pursuant to 6 Anne, c. 16, cannot recover a commission for buying and selling: *Cope* v. *Rowlands.* (5) According to these decisions the contract in the present case is illegal; it is made in contravention of the provisions of a statute which prohibits a person who is a commissioner from entering into a contract with the commissioners. The transaction between Halket and the defendants being therefore void, the whole matter is open, and there is no estoppel. If the bond is void between the immediate parties, the assignee cannot be in a better position than his assignor: Notes to *Miller* v. *Race* (6); *Gorgier* v. *Mieville.* (7) There is a distinction between instruments which pass by delivery and those which pass only after some solemn act, such as writing and registering.

[BLACKBURN, J. In the present case everything has been done to give the plaintiffs a good title, so that no such distinction can arise. The rule laid down by Parke, B., in *Freeman* v. *Cooke* (8), is very applicable to the present case—that if a man so conducts himself that a reasonable man would take the representation to

(1) 7 Ex. 780, 791; 21 L. J. (Ex.) 297, 300.
(2) 1 Sm. L. C. 6th ed. 325.
(3) 5 B. & Ad. 887.
(4) 7 C. B. (N. S.) 99; 29 L. J. (C.P.) 1.
(5) 2 M. & W. 149.
(6) 1 Sm. L. C. 6th ed. 468.
(7) 3 B. & C. 45.
(8) 2 Ex. at p. 663; 18 L. J. (Ex.) at p. 119.

be true, and believe that it was meant that he should act upon it as true, if he does act upon it the party making the representation is precluded from contesting its truth. So in *Re Bahia and San Francisco Ry. Co.* (1) it was decided that a railway company, which had been deceived into registering a transfer of shares, was estopped, as against a subsequent transferee for value, from saying that the transferor had no title. The defendants are, therefore, estopped from saying that the debentures are invalid.]

[He also argued that the debentures having been originally given for goods supplied and not for money lent, the transaction was void; also that the bonds mentioned in paragraph 15 having been given to defray the expenses of the Act, the holders of those bonds were entitled to priority over the bonds held by the plaintiffs; and lastly, that the mandamus prayed ought to have been to levy rates to be applied to the purposes of the Act, and not to apply all the money raised or to be raised, for non constat any money would be raised.]

Pollock, Q.C., was not heard in reply.

COCKBURN, C.J. By 3 & 4 Wm. 4, c. cv. a local Act, which provided for the paving, cleansing, lighting, and improving the town of Herne Bay, certain commissioners are appointed: and by s. 119 the commissioners have power to mortgage the rates which they are empowered to levy under the Act for the purposes which they as such commissioners are to execute; and the present plaintiffs sue upon certain debentures which were issued by the commissioners under that section; and they also claim a writ of mandamus requiring the commissioners to apply the money, raised or to be raised under the Act, to the purposes of the Act. In order to construct certain buildings necessary for the purposes of the Act, the commissioners required a quantity of bricks, and Halket, to whom the debentures were originally given, supplied the bricks in question; and instead of being paid in cash he was paid by debentures. It is said that the transaction, in respect of which the debentures were issued, was illegal under s. 10 of the local Act, inasmuch as by that section any person acting as a commissioner is prohibited from entering into any contract with the commis-

(1) Law Rep. 3 Q. B. 584.

1870

WEBB v. HERNE BAY COMMISSIONERS.

sioners; and that, therefore, the sale of the bricks by Halket to the commissioners, he himself being a commissioner, was an illegal transaction. It may be that the effect of this section was to render the transaction illegal as regards the contract between the commissioners and Halket. But as the commissioners have had the benefit of the contract, the question would be whether or not Halket could recover in indebitatus assumpsit for goods sold. I do not think it necessary to decide that question. I proceed entirely upon the ground that the defendants are estopped from disputing the validity of the debentures in question. It is true the commissioners have power under s. 119 only to borrow money, and it may be that under the power to borrow they were not authorized to give debentures for the purpose of paying for goods and materials supplied to them for the purposes of the town. But the commissioners gave to Halket, in respect of the bricks which they got from him, debentures, in the form prescribed by the Act, which purport upon the face of them to be debentures given for money advanced to them. Halket, to whom the debentures were originally given, has parted with them for a valuable consideration to the testator of the present plaintiffs, who are in the position of assignees of the original holder, and we must take it as a fact that the assignees were perfectly ignorant of any illegality in the original transaction either as regards Halket being a commissioner, and therefore prohibited from entering into such a contract with the commissioners, or as to the fact of their being debentures given for goods supplied instead of for money advanced. Under those circumstances, it is clear the principle laid down in *Pickard* v. *Sears* (1) and *Freeman* v. *Cooke* (2) is immediately applicable to the present case, as well also as the doctrine laid down in the judgment of this Court in the case to which my Brother Blackburn referred, *Re Bahia and San Francisco Ry. Co.* (3). In that case a railway company had been deceived into registering shares and granting certificates of registration, whereby innocent persons were induced to purchase those shares under the belief that the vendors were registered shareholders, and it was held that the company were estopped by their own act from denying the right

(1) 6 A. & E. 469. (2) 2 Ex. 654; 18 L. J. (Ex.) 114.
(3) Law Rep. 3 Q. B. 584.

of the innocent transferees of the shares to be registered as shareholders. I think the principle of all those cases is strictly applicable to this. How is a person who takes for a valuable consideration such debentures as these upon an assignment, regular in form, to know under what circumstances they were issued? The commissioners might be wrong in allowing these debentures to go forth, knowing that they might come into the hands of an innocent holder for value, but according to the principle of the cases cited they are estopped from alleging that the debentures were illegally issued. The debentures on their face import a legal consideration, namely, the advance of money. The defendants issued the debentures with the knowledge that they were capable of being transferred, and would very likely be transferred to a holder for value; how can it lie in their mouths to say that the transaction in respect of which they gave these debentures was illegal? I think on the sound principle of the doctrine laid down in the cases which I have cited, such a defence cannot be made available.

I confess I cannot see any difficulty in the other points made, namely, that the first purpose to which moneys raised by the commissioners is to be applied is that of paying the costs and charges of getting the Act. It is true these expenses have been met partly by debentures which are still unpaid; but that is no answer to an application for payment on the part of the present holder of these debentures.

It was further contended that the mandamus claimed by the plaintiffs will not lie, because it is possible that rates may not hereafter be raised, and the form of the mandamus ought to have been to levy rates out of which to pay the interest on the debentures; but it appears that up to the present time rates have from time to time been levied, and if the rates be levied, inasmuch as the commissioners are bound under the Act to pay interest upon the debentures which they have issued, the mandamus will operate and compel payment of the amounts claimed in this action. If, owing to the form which this mandamus assumes, the commissioners desist from levying the rates, the consequence will be that a further mandamus will be required, commanding the commissioners to levy a rate for the express purpose of paying the interest; but I think we are fairly entitled to presume that that which

1870

WEBB v. HERNE BAY COMMISSIONERS.

has been done, and which it is a part of the duty of the commissioners to do under the provisions of the Act, will continue to be done.

BLACKBURN, J. I am of the same opinion. The plaintiffs claim in the present action a writ of mandamus commanding the defendants to pay any money raised or to be raised under and by virtue of 3 & 4 Wm. 4, c. cv., in the manner prescribed by s. 123 of that Act. That is the duty they require the commissioners to fulfil, stating that the plaintiffs are personally interested in the fulfilment of it. When we turn to s. 123 we find it requires the defendants to apply so much money as may be raised under the Act, in the first place in defraying its expenses, in the next place in paying the interest upon the bonds and debentures, and afterwards in paying for the works and purposes of the Act. The plaintiffs are personally interested in having the money applied as provided by the Act; and if the commissioners have departed from their duty of properly applying the money and causing the interest to be paid, the plaintiffs are entitled to a mandamus.

It is said that the commissioners will not raise any money in future; and if the plaintiffs had anticipated that, they might have come to the Court for a mandamus not only to command the commissioners to apply the money, but to levy rates to raise it; but I see no objection to granting a mandamus in the limited form in which it is asked for, though probably the plaintiffs may be entitled to demand another in a different form at some future time.

The next question is, are the plaintiffs personally interested in the fulfilment of the duty created by the statute; or, in other words, are they the holders of the six debentures in such a manner as to have the right to have them enforced against the defendants? By s. 119 the commissioners are authorized to borrow and take up at interest any sum of money upon the credit of the rates authorized to be raised under the Act, but so that there shall not be owing upon the securities at any one time more than 5000*l.*, and toties quoties, to pay off and renew the loans, and the form of mortgage is given in the Act. And that form commences with the statement on the face of it that the commissioners have

borrowed a particular sum of money of a particular individual upon the credit of the rates. Section 120 provides the mode in which a person who has the mortgage may assign and transfer it; s. 121 enacts that there shall be no preference by reason of priority of the date of the mortgages. S. 122 requires that a book shall be provided in which copies of the mortgages, securities, and transfers shall be entered and registered, to be open to inspection; and then it enacts that, after such entry, every such transfer "shall entitle the person to whom the same shall be made, and his executors, administrators, and assigns to the benefit of the security thereby made or transferred" (1). So that the effect of the statute is this, the commissioners may borrow money and give a form of mortgage which, on the face of it, states expressly that they have borrowed a particular sum of money; the mortgage may be transferred, and when it is entered in the register which they are bound to keep, the transferee shall have the benefit of that security. The plaintiffs' testator has bonâ fide taken a transfer of six mortgages, on the face of which it is expressly stated that the commissioners have borrowed from Halket (who is the person named in the mortgage) six sums of 100*l.* each. The commissioners knew from the Act that these mortgages when so granted might be transferred to a person on the faith of the matters stated in them. They knew from the Act that such transfer might be made and might be entered on the register, and, when registered, the security might be transferred. That being the state of things, the plaintiffs, who are the bonâ fide holders of the mortgages, demand the payment of the interest on the mortgages, and the commissioners deny their liability to pay on the ground that the matters stated on the face of the mortgages are incorrect and untrue. The law laid down in *Freeman* v. *Cooke* (2), and *In re Bahia and San Francisco Ry. Co.* (3), is very clear, that when a person has made a statement similar to the present, he is precluded as against another person who has bonâ fide acted upon it from denying the truth of the statement, and consequently I hold that the commissioners, who have stated on the face of the mortgages

(1) This section was not set out in the case; but the Act was made part of the case.

(2) 6 A. & E. 469. 18 L. J. (Ex.) 114.

(3) Law Rep. 3 Q. B. 584.

1870

WEBB v. HERNE BAY COMMISSIONERS.

that Halket had advanced and lent the money on the credit and for the purposes of the commissioners, are precluded as against his bonâ fide transferees from denying the truth of that statement.

Our decision on this point disposes of the case. I do not think it necessary to enter into the other questions. One is that, inasmuch as the mortgages were given in payment of a debt for bricks sold, they could not have been given for money borrowed. My own impression is—and it is a very strong impression—that the legal effect of such a transaction is the same as if the commissioners had borrowed the cash, and then applied it in payment of the debt for bricks; and as if the creditor had lent the money upon the security of the debenture, and then received back the identical coin in payment of his own debt for the bricks. I see no objection to this view of the transaction, which I incline to think valid.

A further objection was raised. It was founded on s. 10 of the local Act, which provides that where any commissioner is either directly or indirectly interested in any bargain or contract, he shall be disqualified, and further that no person during the time he shall be such commissioner shall be capable of taking or entering into any such bargain or contract, nor shall any commissioner act in any matter in which he shall be personally interested. And s. 11 imposes a penalty of 50*l.* upon every commissioner who acts being disqualified. It was contended that Halket, who had furnished the bricks to the commissioners, being himself a commissioner at the time, the contract was illegal and void. It is not necessary to decide this question, and I wish to guard myself from being thought to give any judgment on that point.

MELLOR, J. I wish to rest my judgment in this case on the general doctrine of estoppel. I cannot distinguish it in principle from *In re Bahia and San Francisco Ry. Co.* (1), which is founded on the very salutary decision of *Freeman* v. *Cooke* (2). The local Act contemplates the borrowing of the money for the purposes of the works of the town of Herne Bay, and it gives a form of mortgage upon which the money is to be borrowed. The form states that in consideration of the sum of money advanced and lent upon

(1) Law Rep, 3 Q. B. 583. (2) 2 Ex. 654; 18 L. J. (Ex.) 114.

the credit of the rates for the purposes of the Act, and paid to the treasurer of the commissioners, they thereby grant and assign a due proportion of the rates. That was the form of the mortgage in this case. In addition to that the Act, which enables the commissioners to raise money upon mortgage in that form, also enables the holder to assign the mortgages. He may, by a writing under his hand, transfer the same to any person, and it gives the form of endorsement by which the transfer may be made. There is a provision for registering the transfer, and when that is completed any person who is an innocent holder has a complete title. The commissioners, who have borrowed the money and enabled the transfer of the mortgage to be effected, cannot afterwards deny their liability on the ground that the mortgage was given, not for money lent, but for some purpose which they allege to be illegal. On that ground I hold the plaintiffs are entitled to the remedy they seek.

LUSH, J. I also think it is unnecessary to express any opinion on the question whether, if this action had been brought by the original mortgagee, the commissioners could have set up any defence against the claim; because the defence, namely, his incapacity to contract at the time by reason of his filling the office of commissioner, cannot be set up against the plaintiffs, his transferees. The mortgage security itself makes the money payable to Halket or his assigns. The Act of Parliament says that any person entitled to any security may transfer it in the terms specified in the Act, and further that when that transfer has been made and registered in the book of the commissioners—and this has been registered—every such transfer shall entitle the person to whom the same shall be made to the benefit of the security thereby transferred. Now the effect of those sections, I think, is to make these mortgages negociable securities and to attach to them the incidents of negociable securities; one of which is that an innocent holder for value, as it is admitted the plaintiffs are, acquires a title of his own unaffected by any infirmity to which the title of his assignor might have been subject. Upon that ground, I think the plaintiffs are entitled to judgment.

Then as to the alleged defect in the prayer of the mandamus,

1870

WEBB v. HERNE BAY COMMISSIONERS.

I think it is quite enough to say that the complaint against the commissioners is not that they do not make rates, but that they apply the proceeds in a different way than that directed by the Act of Parliament. It is to be assumed they will go on making the rates as they have done. The mandamus is directed to the misappropriation. If it turns out to be needful to compel them to do what they have hitherto done—to make the rates—then a mandamus may be applied for for that purpose.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Walker & Martineau.*
Attorneys for defendants: *Lumley & Lumley.*

June 21.

SPURR *v.* CASS.
CASS *v.* SPURR.

Non-joinder of Plaintiffs—Action by one on Contract by two for Benefit of one—Nominal Partnership—Principal and Agent—Set-off.

Spurr, an attorney, practised under the firm of "Spurr and Chambers." Chambers, although an attorney, was not, in fact, a partner of Spurr, but only a clerk. Cass was a client of the nominal firm, and owed a bill of costs; and Spurr was personally liable to Cass on a bill of exchange of less amount than the bill of costs. Spurr, without joining Chambers, sued Cass for the amount of the bill of costs; and Cass pleaded never indebted, and set off the sum due on the bill of exchange. Cass brought a cross action on the bill of exchange, and Spurr set off the amount of the bill of costs. The two actions being tried together, it was found by the jury that Chambers had authorized Spurr to contract on behalf of himself and Chambers with Cass, and that Spurr had so contracted:—

Held, that Spurr, being the real principal, might take the benefit of the contract with Cass and sue alone, and set off the bill of costs in the action against him.

SPURR *v.* CASS.

DECLARATION for work and labour, as an attorney.

Pleas: 1. Never indebted. 2. Set-off of a bill of exchange accepted by the plaintiff.

Issue thereon.

CASS *v.* SPURR.

Declaration on the same bill of exchange.

Pleas: 1. Traverse of the acceptance. 2. Set-off of the defendant's bill of costs.

1870

SPURR v. CASS. CASS v. SPURR.

Issue thereon.

These cross actions were, by consent, tried as one cause, before Cleasby, B., at the Yorkshire Spring Assizes. It appeared that Spurr was an attorney practising under the firm of "Spurr & Chambers." Chambers, however, though admitted as an attorney, was not a partner, but only a clerk of Spurr, under an agreement that he should receive a weekly salary and also an interest in the profits of the business when they exceeded a certain sum. Cass was a client of the nominal firm and owed the bill of costs; and Spurr was personally liable to Cass on the bill of exchange for a less amount than the bill of costs.

The only question at the trial was whether Spurr could sue alone for the bill of costs and set off the bill of costs against the action on the bill of exchange.

The learned judge ruled that the agreement between Spurr and Chambers, which was put in evidence, did not create a partnership; and there being no dispute as to the work having been done for Cass, two questions were left to the jury: first, whether Chambers had authorized Spurr to contract on behalf of himself and Spurr with Cass; secondly, whether Spurr had so contracted. The jury answered both questions in the affirmative; and a verdict was directed for the defendant in Spurr *v.* Cass, and for the plaintiff in Cass *v.* Spurr, leave being reserved to move to enter the verdict in both actions for Spurr, if the Court should be of opinion that Spurr was entitled, notwithstanding the findings of the jury, to sue alone in the first action, and to set off the bill of costs in the second action.

A rule having been obtained accordingly.

A. Wills shewed cause. The question is, whether when the contract is, in fact, made with two persons, one of them may sue alone on it. Spurr and Chambers were jointly employed, as the jury have found. There is no magic in the word partnership, and a person can make a contract with two individuals or with one of them, as he may choose, and if he, in fact, makes a contract with two, nothing short of their mutual consent can reduce it to a contract with one.

[BLACKBURN, J. In the common case of a contract with brokers,

1870

SPURR v. CASS.

CASS v. SPURR.

the contract being in writing is made with the agents, and they are undoubtedly liable on it, but according to the principle laid down in *George* v. *Clagett* (1), the principal may sue.]

Suppose Cass had expressly said, "I contract with you two to have the benefit of the skill of both"?

[BLACKBURN, J. He had a perfect right to stipulate for the skill of Chambers, but what was there to hinder Chambers from agreeing with Spurr that the contract should be for the benefit of Spurr alone? Although the contract was with the two, the money was to be paid to Spurr alone; and it matters not to Cass; for, whatever would be an answer to an action by the two, would still be an answer to the action by Spurr alone.]

In Lindley on Partnership, 2nd ed. vol. i. p. 478, it is stated that, "If a nominal partner is a party to the contract sued upon, he must be a party to the action brought upon it," and *Guidon* v. *Robson* (2), is cited.

[BLACKBURN, J. That case relates to a bill of exchange.]

So, in Chitty on Contracts, 8th ed. p. 222, note m, "A nominal partner need not be joined as a co-plaintiff if not expressly a party to the contract." If he be expressly a party to the contract, it follows that he must be joined: Collyer on Partnership, 2nd ed. p. 470, is to the same effect.

[BLACKBURN, J. There the application of the doctrine contended for seems to be correctly limited to bills of exchange.]

The case of *Kell* v. *Nainby* (3), which was cited on moving the rule, is distinguishable, for there the jury were not asked the question whether there was a contract, in fact, between the father and son who were apparently partners. What difference is there in principle between signing a bill of exchange and any other contract?

[BLACKBURN, J. Parke, B., in *Beckham* v. *Drake* (4) says: "The case of bills of exchange is an exception which stands upon the law merchant, and promissory notes another, for they are placed upon the same footing by the statute of Anne. In neither of these cases can any but the parties named in the instrument by their name or firm, be made liable to an action upon it."]

Had Cass been aware of the true state of things, he would not

(1) 7 T. R. 359; 2 Sm. L. C. 6th ed. 113.
(2) 2 Camp. 302.
(3) 10 B. & C. 20.
(4) 9 M. & W. at p. 96.

have sued Spurr, and so subjected himself to a plea of set-off which entitled the defendant to the costs of the action. His position has been altered by Chambers being held out as a partner.

[LUSH, J. It might be considered equally a hardship when a person sells goods to another who promises to pay ready money but does not, and pleads a set-off when sued.]

Field, Q.C., and *Lewers*, were not called upon to support the rule.

BLACKBURN, J. There can be no doubt that the principle upon which *Beckham* v. *Drake* (1) was decided is applicable to the present case; and that whenever a contract is made, which is not under seal nor by bill of exchange, if one of the contracting parties has a real principal behind him, that real principal may intervene and take the benefit of the contract and sue upon it, subject to any right of set-off there may be against the agent. Here the contract was undoubtedly made between Chambers and Spurr of the one part and Cass of the other. In fact, Spurr and Chambers were not partners; but they were the agents of Spurr in making the contract.

The case of *Beckham* v. *Drake* (1) is almost the converse of this case. There, Knight, Surgey, and Drake, were in partnership as typefounders, Drake being a dormant partner, and an agreement was entered into between Knight and Surgey of the one part, and Beckham, the plaintiff, of the other part, whereby the plaintiff agreed to serve Knight and Surgey in their trade, and they agreed to employ him as their foreman. At the time the agreement was entered into it was unknown to the plaintiff that Drake was a partner in the business. The question so much debated in that case was, whether an action was maintainable by the plaintiff against Knight, Surgey, and Drake, for a breach of the agreement, although Drake was not a party named in it or signing it; and the Court of Exchequer held that the action was maintainable. Here the two make the contract with Cass, and the question is, whether one may say, "I was the principal, and I claim to sue alone."

Kell v. *Nainby* (2) is also in point to the same extent. Kell was the real principal; the contract was made in the name of Kell

(1) 9 M. & W. 79. (2) 10 B. & C. 20.

1870

SPURR v. CASS.
CASS v. SPURR.

and Son, but Kell being the sole party was permitted to sue alone. I think, therefore, the rule should be made absolute to enter a verdict for Spurr in both actions.

MELLOR and LUSH, JJ., concurred.

Rule absolute.

Attorney for plaintiff: *F. W. Blake.*
Attorneys for defendant: *Hancock & Co.*

June 18.

KNIGHTS *v.* WIFFEN.

Vendor and Vendee—Unpaid Vendor—Property in Goods unseparated from Bulk—Estoppel by assent to Delivery Order.

The defendant, having a quantity of barley in sacks lying in his granary which adjoined a railway station, sold eighty quarters of it to M. No particular sacks were appropriated to M., but the barley remained at the granary subject to his orders. M. sold sixty quarters of it to the plaintiff, who paid him for them and received from him a delivery order addressed to the station-master, as was usual in such cases. The plaintiff sent this order in a letter to the station-master, saying, "Please confirm this transfer." The station-master shewed the delivery order and the plaintiff's letter to the defendant, who said, "All right, when you get the forwarding note I will put the barley on the line." M. became bankrupt; and the defendant, as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the station-master acting for the plaintiff:—

Held, that the defendant was estopped by his statement to the station-master from denying that the property in the goods had passed to the plaintiff; for, by making such statement, he induced the plaintiff to rest satisfied under the belief that the property had passed, and so to alter his position by abstaining from demanding back the money which he had paid to M.

DECLARATION for conversion of sixty quarters of barley of the plaintiff.

Pleas: 1. Not guilty. 2. That the barley was not the property of the plaintiff.

Issue thereon.

At the trial before Keating, J., at the Surrey Spring Assizes, it appeared that the defendant, a corn-merchant, had a large quantity of barley, in sacks, lying in his granary, which adjoined the Stanstead Station of the Great Eastern Railway. He sold

eighty quarters of this barley to one Maris, but no particular sacks were appropriated to the purchaser. While the barley remained in the defendant's granary, subject to the orders of Maris, the latter sold sixty quarters of it to the plaintiff, who paid him for them, and received from him the following delivery order addressed, as was usual in similar transactions, to the "Station-master, Stanstead,—Sir, deliver Mr. T. Knights sixty quarters of barley to my order, R. W. Maris, jun., June 27th, 1868." Underneath was written "Thomas Knights, jun., Hemingford Gray, near St. Ives, Huntingdonshire." The plaintiff sent this document to the station-master, and wrote with it:—"Sir, I enclose Mr. R. W. Maris, jun.'s, transfer of sixty quarters of barley to my account. Please confirm this transfer, and send me a sample, and say what weight is in due course." On receipt of this letter and the delivery order, the station-master shewed them both to the defendant, who said, "All right, when you get the forwarding note I will put the barley on the line." Samples were afterwards given to the station-master, which were sent by him to the plaintiff. Three sacks were weighed. The plaintiff ultimately gave an order, or forwarding note, to the station-master, for the sixty quarters of barley to be sent to Cambridge, which he presented to the defendant, but Maris had then become bankrupt, and the defendant, as unpaid vendor, refused to part with the barley.

The learned judge directed a verdict for the defendant, giving the plaintiff leave to move to enter a verdict for 53*l.* 18*s.* 7*d.*, the amount claimed.

A rule was obtained pursuant to the leave reserved, on the ground that there was evidence which ought to have been submitted to the jury to prove that the defendant had accepted, and agreed to act upon the delivery order of the vendee (Maris), and thus passed the property in the sixty sacks of barley; or for a new trial on the ground that the judge ought to have directed a verdict for the plaintiff for three sacks at least.

Wood Hill (*Day* with him) shewed cause. There was no appropriation of the barley so as to pass the property, nor was there anything done by the defendant to estop him from denying that the property had passed.

1870

KNIGHTS v. WIFFEN.

[LUSH, J. The rule in *Pickard* v. *Sears* (1) applies.]

This case does not come within the rule; there was nothing here to estop the defendant. *Woodley* v. *Coventry* (2) will be relied on by the other side; the argument for the plaintiffs in that case was that the statement of the warehouseman that "all was right," estopped the defendants, "for the plaintiffs paid their money on the faith of that statement." And all the cases cited in support of that argument are cases where money had been paid on the faith of the statement set up as an estoppel; and in *Biddle* v. *Bond* (3) Blackburn, J., delivering the judgment of the Court thus refers to those cases: "Several cases were cited on the argument at the bar, and more might have been cited, such as *Stonard* v. *Dunkin* (4), *Gosling* v. *Birnie* (5), and *Hawes* v. *Watson* (6), in which a bailee, who, by attorning to a purchaser of the goods, has, in effect, represented to him that the property has passed to him (though such was not the fact), and has thereby induced him to alter his position and pay the price to his vendor, has been held estopped from denying the property of the person to whom he has thus attorned, by setting up a title in a third person inconsistent with the representation on which he had induced the plaintiff to act. We in no way question that those cases were rightly decided." Here the purchase-money had been paid by the plaintiff before the statement was made. The distinction between *Gillett* v. *Hill* (7) and the present case is, that that was the case of a wharfinger with goods in his possession which were not his own property receiving without remark a delivery order respecting those goods from the purchaser; and the jury found that there had been an acceptance of the delivery order for the full quantity of goods mentioned therein; and Lord Lyndhurst, C.B., says (8): "The case has been argued on the ground of there having been more than twenty sacks of flour belonging to Orbell" (the vendor) "in the defendants' possession; but there is no distinct proof on the part of the defendants that they had more of Orbell's flour in their possession than those twenty sacks, or that the plaintiff

(1) 6 Ad. & E. 469.
(2) 2 H. & C. 164; 32 L. J. (Ex.) 185.
(3) 6 B. & S. 225, 231; 34 L. J. (Q.B.) 137, 139.
(4) 2 Camp. 344.
(5) 7 Bing. 339.
(6) 2 B. & C. 540.
(7) 2 C. & M. 530.
(8) 2 C. & M. 534.

knew that the defendants had more in their possession. I think, therefore, that the verdict was right, and that trover is maintainable." The fact wanting in that case is supplied in the present case. The forwarding order was not sent for some days. It cannot be said that possession had passed here.

[BLACKBURN, J., referred to *Farina* v. *Home*. (1)]

Ingham (with him *Parry*, *Serjt.*, and *Kemp*) in support of the rule. The defendant is estopped from saying the property did not pass. "The general rule of law is, that whatever a man's *real* intention may be, if he *manifests* an intention to another party, so as to induce the latter to act upon it, he will be estopped from denying that the intention as manifested was his real intention:" Benjamin on Sale, p. 39. Here the station-master being constituted the plaintiff's agent went to the defendant and said, in effect, "Do you hold sixty sacks of barley the property of the plaintiff?" His reply amounted to this: "I do hold them, and will deal with them as you wish." *Woodley* v. *Coventry* (2) is in point. There defendants, corn-factors, sold 350 barrels of flour to C., and gave him a delivery order on the defendants. C. gave the order to the plaintiffs, who sent it to the defendants' warehouse, where the flour remained. The warehouseman said, "It is all right," and gave samples of the flour, and the plaintiffs thereupon advanced money to C. In point of fact, no appropriation had been made of 350 barrels from a larger number in the defendants' warehouse. C. became bankrupt, and the price remained unpaid to the defendants. The plaintiffs having brought trover for the flour, it was held that the defendants were estopped by their conduct from saying that the property in the flour did not pass to the plaintiffs. So here, the plaintiff, although he had already paid for the barley, altered his position in consequence of the defendant's statement, for he allowed the goods to remain; and the defendant did not say, "When you get the delivery order I will hold for you," but, "When you get a forwarding note I, acting as your agent, will do whatever you require about the goods."

BLACKBURN, J. I think that the plaintiff is entitled to the verdict, and the rule should be made absolute to enter a verdict

(1) 16 M. & W. 119. (2) 2 H. & C. 164; 32 L. J. (Ex.) 185.

1870

KNIGHTS v. WIFFEN.

for him. I will state shortly what I consider to be the facts upon which the case seems to turn. The defendant Wiffen had in his own warehouse a large quantity of barley, and he sold to Maris eighty quarters which, on the contract between him and Maris, remained in his possession as unpaid vendor. No particular sacks of the barley were appropriated as between Maris and Wiffen; but at the time the contract was made Maris had a right to have eighty quarters out of that barley appropriated to him; and at the same time Wiffen, as the unpaid vendor, had a right to insist on the payment of the price before any part of the grain was given up. Maris afterwards entered into a contract with the plaintiff Knights by which he sold him sixty sacks of the barley, and Knights paid him for them. A document was given by Maris to Knights, in the shape of a delivery order addressed to a station-master of the Great Eastern Railway, instructing him to deliver to Knights' order sixty quarters of barley on his, Maris', account. Knights forwarded it to the station-master, enclosed in a letter authorizing the station-master to hold for him. The station-master went to Wiffen and shewed him the delivery order and letter, and Wiffen said, "All right, when you receive the forwarding note, I will place the barley on the line." What does that mean? It amounts to this, that Maris having given the order to enable Knights to obtain the barley, Wiffen recognized Knights as the person entitled to the possession of it. Knights had handed the delivery-order to the station-master, and Wiffen, when the document was shewn to him, said, in effect, "It is quite right; I have sixty quarters of barley to Maris' order, I will hold it for you; and when the forwarding-note comes I will put it on the railway for you." Upon that statement Knights rested assured, and Wiffen, by accepting the transfer which had been informally addressed to the station-master, bound himself to Knights. The latter accordingly, when he did not get the goods, brought an action of trover against Wiffen, saying, as it were, "You said that you had the sixty quarters of barley, and that you would hold the goods for me. You cannot refuse to deliver to me; if you do refuse it will be a conversion." And Wiffen now says, "It is all true, but I *do* refuse to deliver the barley. Granted that I previously said I would hold sixty quarters of barley for you, yet I had none to hold for

1870

KNIGHTS v. WIFFEN.

you. I had no quarters belonging to Maris, for I never severed them from the bulk, and I am entitled to hold the whole quantity as against Maris, until I am paid the full price." No doubt the law is that until an appropriation from a bulk is made, so that the vendor has said what portion belongs to him and what portion belongs to the buyer, the goods remain in solido, and no property passes. But can Wiffen here be permitted to say, "I never set aside any quarters?" As to that, *Woodley* v. *Coventry* (1) is very much in point; with this difference only, that there the plaintiff acted on the statement of the warehouseman, and altered his position by paying the vendee a part of the price, and so the doctrine of estoppel applied; which doctrine is—that where one states a thing to another, with a view to the other altering his position, or knowing that, as a reasonable man, he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement. Woodley had altered his position by paying part of the price, but Coventry did not know of it. In *Stonard* v. *Dunkin* (2) it is patent that the defendant knew the money was paid. In *Hawes* v. *Watson* (3) it appears that payment had been made, but the defendant did not know of it, although, as a reasonable man, he might have known it was likely. But in neither of those cases did the defendants know that money was *going* to be paid. In the present case the money had been paid before the presentation of the delivery order; but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that, when he assented to the delivery order, the plaintiff, as a reasonable man, would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Maris and have demanded back his money, very likely he might not have derived much benefit if he had done so; but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. If once the fact is established, that the plaintiff's position is altered by relying on the statement and taking no steps further, the case becomes identical

(1) 2 H. & C. 164; 32 L. J. (Ex.) 185. (2) 2 Camp. 344.
(3) 2 B. & C. 540.

1870

KNIGHTS v. WIFFEN.

with *Woodley* v. *Coventry* (1), and *Hawes* v. *Watson*. (2) It is to be observed, moreover, that the judgment of the Court in *Woodley* v. *Coventry* (1) did not rest on the fact of the payment of the price. It will be noticed there that although the fact did exist of payment of price, Martin, B., seems to found his decision on the *assenting to hold*, and the fact that when that assent was communicated to the plaintiffs they altered their position. In *Gillett* v. *Hill* (3) there was no payment of the price, and the Court of Exchequer gave judgment against the wharfingers, on the ground that they were estopped from denying the facts, after the other party had altered his position, relying on their conduct when the delivery order was presented. In the present case the plaintiff altered his position, relying on the defendant's conduct when the delivery order was presented. The plaintiff may well say, "I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true."

MELLOR, J. I am entirely of the same opinion. Lord Ellenborough says in *Stonard* v. *Dunkin* (4), "Whatever the rule may be between buyer and seller, it is clear the defendants cannot say to the plaintiff 'The malt is not yours,' after acknowledging to hold it to his account. By so doing, they attorned to him; and I should entirely overset the security of mercantile dealings were I now to suffer them to contest the title." I think the question is concluded by this and all the authorities, and the doctrine of estoppel, when generally applied to cases of this kind, is certainly very useful. The foundation of that doctrine is clearly stated in my Brother Blackburn's book on Sale, p. 162, and I am not aware that any of the cases he cites and comments on in support of his reasoning have been ever overruled, qualified, or questioned. He says: "This is a rule, which, within the limits applied by law, is of great equity; for when parties have agreed to act upon an assumed state of facts, their rights between themselves are justly made to depend on the conventional state of facts and not on the truth. The reason of the rule ceases at once when a stranger to the arrangement seeks to avail himself of the statements which were not

(1) 2 H. & C. 164; 32 L. J. (Ex.) 185.
(2) 2 B. & C. 540.
(3) 2 C. & M. 530.
(4) 2 Camp. 344.

made as a basis for him to act upon. They are for a stranger evidence against the party making the statement, but no more than evidence which may be rebutted; between the parties they form an estoppel in law."

LUSH, J. I also think that the plaintiff is entitled to judgment on this short and intelligible ground, supported by sound reason and by all the authorities, that the defendant, by what he said to the station-master, assented to the transfer, and induced the plaintiff to believe that he would hold the barley to his order. By so doing he altered the position of the plaintiff towards Maris. The plaintiff might, on a refusal by the defendant to hold for him, have applied to Maris, and he was deprived of the information which would have caused him to have done so. The defendant is therefore precluded from denying what he said. There is no distinction whatever between this case and *Woodley* v. *Coventry* (1), in principle. There the party actually paid the money, here the plaintiff had already paid the money first; but if his order had been rejected he might have required his money back.

Rule absolute to enter a verdict for the plaintiff.

Attorney for plaintiff: *W. H. Shaw.*
Attorney for defendant: *E. W. Field.*

(1) 2 H. & C. 164; 32 L. J (Ex.) 185.

END OF TRINITY TERM, 1870.

REGULÆ GENERALES.

GENERAL RULES

UNDER

THE DEBTORS ACT, 1869.

MICHAELMAS TERM, 1869.

In pursuance of the Common Law Procedure Act, 1852, and the Debtors Act, 1869, it is ordered that on and after the 1st day of January, 1870, the following rules shall be in force for regulating the practice under and carrying into effect the first part of the said Debtors Act, 1869 :—

I.

All applications to commit to prison, under section 5, shall in the first instance be made by summons before a Judge, which shall specify the date and other particulars of the judgment or order, for non-payment of which the application is made, together with the amount due, and be indorsed with the particulars required by Rule 73 of Hilary Term, 1853.

II.

The service of summons whenever it may be practicable shall be personal, but if it appear to the Judge that reasonable efforts

have been made to effect personal service, and either that the summons has come to the knowledge of the debtor, or that he wilfully evades service, an order may be made as if personal service had been effected, upon such terms as to the Judge may seem fit.

III.

Proof of the means of the debtor shall, whenever practicable, be given by affidavit, but if it appear to the Judge, either before or at the hearing, that a *vivâ voce* examination, either of the debtor or of any other person, or the production of any document, is necessary or expedient, an order may be made commanding the attendance of any such person before the Judge at a time and place to be therein mentioned, for the purpose of being examined on oath touching the matter in question [or] and for the production of any such document, subject to such terms and conditions as to the Judge may seem fit. The disobedience to any such order shall be deemed a contempt of Court and punishable accordingly.

IV.

The order of committal (which may be in Form A in the Schedule, or to the like effect), shall, before delivery to the Sheriff, be indorsed with the particulars required by Rule 73 of Hilary Term, 1853. Concurrent orders may be issued for execution in different counties. The Sheriff and Officers shall be entitled to the same fees in respect thereof, as are now payable upon a *ca. sa.*

V.

Upon payment of the sum or sums mentioned in the order (including the Sheriff's fees in like manner as upon a *ca. sa.*) the debtor shall be entitled to a certificate in Form B in the Schedule, or to the like effect, signed by the Attorney in the cause, or (if the creditor) signed by the creditor and attested by an Attorney on his behalf, or a justice of the peace.

VI.

Orders to arrest under the 6th section (which may be in the Form of C in the Schedule, or to the like effect), shall be made

upon affidavit exparte, but the defendant shall be at liberty at any time after the arrest to apply to rescind or vary the order, or to be discharged from custody, or for such other relief as may be just. Such orders shall, before delivery to the sheriff, be indorsed with the particulars required by Rule 73 of Hilary Term, 1853. Concurrent orders may be issued for arrest in different counties. The Sheriff and Officer shall be entitled to the same fees in respect thereof as are now payable upon a *capias*.

VII.

The security to be given by the Defendant may be a deposit in Court of the amount mentioned in the order, or a bond to the Plaintiff by the Defendant and two sufficient sureties (or, with leave of a Judge, more than two), or, with the Plaintiff's consent, any other form of security.

The Plaintiff may, within four days after receiving particulars of the names and addresses of the proposed sureties, and the form of the proposed bond, give notice that he objects thereto, stating therein in what particulars, and in case of his so doing the sufficiency of the security shall be determined by the Master, who shall have the power to award the costs of such reference to either party. It shall be the Plaintiff's duty to obtain an appointment for that purpose, and unless he does so within four days after giving notice of objection, the security shall be deemed sufficient.

VIII.

The money deposited and the security, and all proceedings thereon, shall be subject to the order and control of the Court or a Judge.

IX.

Unless otherwise ordered, the costs of and consequent on an order to arrest shall be costs in the cause.

X.

Upon payment into Court of the amount mentioned in the order a receipt shall be given by the proper Officer, and upon receiving the bond or other security, a certificate to that effect

shall be given, signed or attested by the Plaintiff's Attorney, and the delivery of such receipt or certificate to the Sheriff shall entitle the Defendant to be discharged out of custody.

XI.

The Sheriff or other Officer named either in an order of committal, or an order to arrest under the 6th Section, shall, within two days after the arrest, indorse on the order the true date of such arrest.

A. E. Cockburn,
William Bovill,
Fitzroy Kelly,
W. F. Channell,
Colin Blackburn,
H. S. Keating,
John Mellor,
M. E. Smith,
Robert Lush,
James Hannen.

SCHEDULE.

A.

UPON HEARING, &c.,

[*Christian and Surname of the Debtor and of the party claiming.*]

I do order that the said A. B. be for default in payment of the debt hereinafter mentioned committed to prison for the term of [*six*] weeks from the date of his arrest, including the day of such date, or until he shall pay £ , being the amount of [*an instalment due to the said* C. D., *upon*] [*or a judgment of the Court of*] [*or an order made by*], bearing date the day of , together with £ for costs of this order, and Sheriff's fees, for the execution hereof. And I order that the Sheriff of [*Middlesex*] do take the said A. B. for the purpose aforesaid, if he shall be found within his Bailiwick.

Dated, &c.

B.

I CERTIFY that A. B., now in the gaol of , upon an order of the Honourable Mr. Justice , at the suit of C. D., for non-payment of a debt of £ has satisfied the said debt, together with the costs mentioned in the said order, and Sheriff's fees.

Dated, &c.,

E. F., of, &c.
Attorney for the said C. D.

or,

Witness to the signature of C. D. } C. D., of, &c.

G. H., of, &c., his Attorney,

or, J. K., Justice of the Peace for

C.

UPON READING the affidavit of, &c.,

I do order that the Defendant be arrested and imprisoned for months from the date of his arrest, including the day of such date, unless and until he shall sooner deposit in Court the sum of £ , by way of security, or give to the Plaintiff a bond executed by him (1) and two sufficient sureties in the penalty (2) of £ or some other security satisfactory to the Plaintiff, that he will not go out of England without the leave of the Court [*or, that any sum recovered against him in this action shall be paid, or that he shall be rendered to prison.*] And I order that the Sheriff of [*Middlesex*] do within one calendar month from the date hereof, including the day of such date, and not afterwards, take the Defendant for the purpose aforesaid, if he shall be found in the said Sheriff's Bailiwick.

Dated, &c.

A. E. Cockburn,	H. S. Keating,
William Bovill,	John Mellor,
Fitzroy Kelly,	M. E. Smith,
W. E. Channell,	Robert Lush,
Colin Blackburn,	James Hannen.

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(1) With leave of a Judge, there may be more than two sureties.

(2) When the action is for a penalty or sum in the nature of a penalty other than a penalty in respect of any contract, this must be sufficient to include the probable costs of the action, and the terms must be those in *italics*.

DIRECTIONS TO TAXING MASTERS.

TRINITY TERM, 1870.

On taxation of costs on a Writ of Inquiry, the Master should allow only for one Counsel, unless in the exercise of his discretion on all the circumstances of the case, including the amount in dispute, he is satisfied that there was more to do in the case than could reasonably be imposed on one Counsel only.

A. E. Cockburn,
W. Bovill,
Fitzroy Kelly,
Samuel Martin,
W. F. Channell,
Colin Blackburn,
H. S. Keating,
Montague Smith,
James Hannen.

June 14th, 1870.

INDEX.

ABANDONMENT—Loss by capture—Sale of goods - - - Ex. Ch. 599
See CAPTURE.

ABSTRACT OF TITLE—Sale of leasehold 213
See TITLE TO LEASEHOLD.

ADJOURNMENT OF COURT—*Parliament—Corrupt Practices at Elections—Power of Commissioners to hold Meetings without Adjournment*—15 & 16 *Vict. c.* 57, *s.* 4.] By 15 & 16 Vict. c. 57, s. 4, the commissioners appointed under the Act to inquire into the existence of corrupt practices at an election for any county or borough, shall, within a reasonable time after their appointment, go to such county or borough, and shall from time to time hold meetings for the purposes of the inquiry at some convenient place within the same or within ten miles thereof, and shall have power to adjourn such meetings from time to time and from any one place to any other place within such county or borough, or within ten miles thereof:—*Held*, that the commissioners have power to hold meetings from time to time without any formal adjournment.—*Quære*, whether, if a formal adjournment were necessary, an adjournment by two out of three commissioners, in the absence of the third, but with his express assent, would not be a valid adjournment. FITZGERALD'S CASE - - - - - - - 1

ADMISSION BY CONDUCT—*Evidence—Admission by Party to an Action that he has a bad Case—Conspiracy to suborn False Evidence.*] On the trial of an action by the plaintiff and wife for injuries sustained by the wife owing to the defendants' negligence, the plaintiff's case was proved by the evidence of the wife and other witnesses; and, the defendants having called evidence to prove that the wife was in fault, tendered the following evidence, which was received, subject to objection. W. deposed that he, the plaintiff, and C., a clerk of the plaintiff's attorney, were together at the plaintiff's house; the plaintiff said that if W. would give evidence as to the accident he should share the compensation; the plaintiff knew that W. was not present at the accident, and W. said he was not, and C. said if W. would not come forward he, C., would get other witnesses. Two other witnesses deposed to similar proposals made to them by C., but not in the plaintiff's presence, to give false evidence. The plaintiff was not present at the accident; and

ADMISSION BY CONDUCT—*continued.*

neither he nor C. had been called as witnesses:—*Held*, that the evidence was rightly received, as amounting to evidence of an admission, by conduct, of the plaintiff that he had a bad case. C having been shewn to be acting in concert with the plaintiff to suborn false witnesses, what C. did in furtherance of that object in the absence of the plaintiff might be inferred to have been done with the plaintiff's privity. MORIARTY *v.* LONDON, C. AND D. RY. CO. - - - - 314

AGENT—Auctioneer—Action - - 340
See AUCTION.

—— Construction of order to purchase goods
See ORDER TO PURCHASE. [Ex. Ch. 516

—— Joinder of parties—Action by one on contract by two - - - 656
See JOINDER OF PARTIES.

—— Necessaries for wife—Lunacy of husband
See NECESSARIES FOR WIFE. [51

AGREEMENT: *See* CONTRACT.

ALTERATION OF JUDGMENT—County Court
See COUNTY COURT APPEAL. - [208

ANIMUS REVERTENDI—Poor—Removal - 406
See IRREMOVEABILITY. 3.

APPEAL—Certificate of justices—Highway Act, 1864 - - - - - 87
See HIGHWAY ACT, 1864. 1.

—— County Court—Refusal by judge to sign case - - - - - 208
See COUNTY COURT APPEAL.

APPEARANCE TO WRIT IN PERSON—*Practice—Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *ss.* 30, 31.] The appearance of a defendant in person to a writ of summons under the Common Law Procedure Act, 1852, ss. 30, 31, need not be by the own proper person of the defendant, and the memorandum required by s. 31 may be delivered to the officer by a third person, duly authorized in the defendant's behalf. OAKE *v.* MOORECROFT - - - - - 76

APPLICATION OF TOLLS—*Turnpike Road—Deficiency of Trust Fund—Rate in Aid—Apportionment—Contribution*—4 & 5 *Vict. c.* 59.] Where the roads of a turnpike trust pass through several parishes, and the funds of the trusts applicable to the repairs of the roads are insufficient, the funds ought to be apportioned to the roads in each

APPLICATION OF TOLLS—*continued.*
parish according to the amount of repairs in each parish, and not according to the mileage in each; and the deficiency thus left in each parish may be supplied by contribution out of the highway rates, under 4 & 5 Vict. c. 59, s. 1. The Trustees of the Brighton, Cuckfield, &c., Turnpike Roads *v.* Preston - - - - 146

2. —— *Trust of Turnpike Road*—5 & 6 *Wm.* 4, *c.* 50, *s.* 94.] By a local Turnpike Act the tolls were to be applied, in the first place, in payment of the costs, &c., of the Act; in the next place, in paying and discharging all interest now due and owing, and which shall hereafter become due, upon any mortgage or securities of the tolls hereby granted, and in defraying the expenses of erecting toll-houses, &c., and of widening, repairing, &c., the roads; and lastly, in reducing, paying off, and discharging the several sums of money due on any mortgage or securities, and also other debts now due or hereafter to become due:—*Held*, that the trustees were at liberty, under their Act, to apply the tolls in payment of arrears of interest in priority to the repairs of the road, and that the funds not being sufficient for both, no order could be made upon them by justices to contribute towards the repairs, under 5 & 6 Wm. 4, c. 50, s. 94.—*Reg.* v. *Hutchinson* (4 E. & B. 200; 24 L. J. (M.C.) 25) distinguished. The Bruton Turnpike Trustees *v.* The Wincanton Highway Board - - - - - - - 437

APPORTIONMENT—Tolls—Turnpike road 146
See Application of Tolls. 1.

ARBITRATION — Agreement — Lands Clauses Act, 1845—Costs - - - 333
See Arbitration under Lands Clauses Act, 1845.

—— Costs - - - - 47, 333, 361
See Costs of Arbitration. 1, 2.
Arbitration under Lands Clauses Act, 1845.

—— Decision of arbitrator, when final — Boat race - - - - - Ex. Ch. 40
See Referee of Race.

—— Sending back award—Costs - - 47
See Costs of Arbitration. 1.

ARBITRATION UNDER LANDS CLAUSES ACT, 1845 (8 *Vict. c.* 18)—*Lands Clauses Act*, 1869 (32 & 33 *Vict. c.* 18), *s.* 1—*Construction—Taxation of Costs.*] S. 1 of the Lands Clauses Act, 1869, enacts that "where in England under the Lands Clauses Act, 1845, or any Act incorporating the same, any question of disputed compensation is determined by arbitration, the costs of and incidental to the arbitration and award shall, if either party so requires, be taxed and settled by one of the taxing masters of the superior courts of law . . .":—*Held*, that this section only applies to arbitrations proceeding simply under the Lands Clauses Act, 1845, and not to arbitrations which embrace matters that could not be the subject of arbitration under the Lands Clauses Act, 1845, except by agreement between the parties. *Semble*, that the section is not retrospective, and therefore does not apply to arbitrations under agreements made before the passing of the statute. Doulton *v.* The Metropolitan Board of Works - 333

ARBITRATOR: *See* Arbitration.

ARCHDEACON — Liability of churchwardens to pay fee to registrar - - 753
See Churchwardens.

ARMY — Action by officer against superior for libel—Privileged communication 94
See Privileged Communication. 1.

ARREST UNDER CA. SA.—False imprisonment—Judgment set aside - - 203
See False Imprisonment.

ARTIFICIAL MANURE—Exemption from toll
See Exemption from Toll. [224

ASSENT TO DELIVERY ORDER — *Vendor and Purchaser—Unpaid Vendor—Property in Goods unseparated from Bulk—Estoppel.*] The defendant, having a quantity of barley in sacks lying in his granary which adjoined a railway station, sold eighty quarters of it to M. No particular sacks were appropriated to M., but the barley remained at the granary subject to his orders. M. sold sixty quarters of it to the plaintiff, who paid him for them and received from him a delivery order addressed to the station-master, as was usual in such cases. The plaintiff sent this order in a letter to the station-master, saying, "Please confirm this transfer." The station-master shewed the delivery order and the plaintiff's letter to the defendant, who said, "All right, when you get the forwarding note I will put the barley on the line." M. became bankrupt; and the defendant, as unpaid vendor, refused to deliver the barley when the forwarding note was presented to him by the station-master acting for the plaintiff:—*Held*, that the defendant was estopped by his statement to the station-master from denying that the property in the goods had passed to the plaintiff; for, by making such statement, he induced the plaintiff to rest satisfied under the belief that the property had passed, and so to alter his position by abstaining from demanding back the money which he paid to M. Knights *v.* Wiffen - - - - - 660

ASSIGNMENT OF DEBENTURE—*Estoppel—Illegality of Contract—Mandamus.*] A body corporate, having issued debentures, which are assignable, and purport to have been executed pursuant to powers conferred by statute, is estopped from alleging against an innocent assignee for value that the debentures have been issued illegally and in contravention of the statutory powers; and the assignee may by action of mandamus compel the body corporate to apply its funds to liquidate the interest due on the debentures, as required by their Act of incorporation. Commissioners were incorporated by statute for the purpose of improving the town of H., and were empowered to levy rates, and to borrow money. For securing the payment of the loans made to them, they were authorized to issue in a prescribed form debentures, bearing interest and capable of assignment. A person being a commissioner was forbidden under a penalty to accept any contract for carrying out the objects of the statute. The commissioners bought bricks for the purposes of the Act from P. H., a commissioner; and in order to provide for payment of the bricks they executed and delivered to him debentures in the prescribed form, which were duly registered as required by the Act. P. H. assigned them to the plaintiffs for value without notice of the circumstances under which they were issued. The commissioners having

ASSIGNMENT OF DEBENTURE—*continued.*
made default in payment of the interest due upon the debentures:—*Held*, assuming the transaction to have been illegal, that, as the commissioners had issued the debentures knowing that they might be assigned, they were estopped from alleging that the debentures had been illegally issued; and that the plaintiffs were entitled to maintain an action of mandamus to compel the commissioners to apply their funds in payment of the interest. Webb *v.* The Commissioners of Herne Bay - - - - - - 642

AUCTION—*Action by Auctioneer for Price of Goods—Agreement between Purchaser and Principal—Payment by Auctioneer to Principal.*] The plaintiff, an auctioneer, was employed by W. to sell certain goods by auction. W. was indebted to the defendant in 60*l.*, and before the sale it was agreed between W. and the defendant that any goods the defendant might buy at the auction should go in payment of his claim against W. The plaintiff had no notice of this agreement at the time of the sale. The defendant bought several lots, to the amount of 49*l.*, and the plaintiff allowed him to take them away on the faith of his paying for them, but the defendant supposed that he was taking them in pursuance of the agreement with W. The day after the sale the plaintiff paid W. 90*l.* on account of the sale. Afterwards the defendant informed the plaintiff of the agreement between the defendant and W.; and after this notice the plaintiff, on the demand of W., paid over to him the balance due on the sale, about 100*l.*, after deducting his, the plaintiff's, commission and charges as auctioneer. The plaintiff then sued the defendant in the county court for the amount of his purchases at the sale:—*Held*, that the defendant was entitled to the verdict. By the terms of the original agreement between the defendant and W. before the sale, the defendant was entitled to have the goods without payment, and the plaintiff's charges in respect of the goods had been satisfied before action. The plaintiff therefore (if he had not already paid over the amount) would have been bound to pay over the whole proceeds recovered in this action to W., who, by the agreement, was not entitled to anything. The facts, therefore, which shewed that W. would not be entitled to recover, established a defence to the action by the plaintiff. The fact that the plaintiff gave up the goods on the faith of the defendant paying for them created no liability in the latter, as he had been guilty of no deceit; and there were no facts beyond the mere receipt of the goods from which a promise on the part of the defendant to pay could be inferred. And the fact that the plaintiff had paid over to W. the price of the goods could not affect the defendant's rights, as the plaintiff had then had notice of the agreement between W. and the defendant. Grice *v.* Kenrick - - - - - - 340

AUTHORITY—Husband and wife—Necessaries—Lunacy of husband - - 51
See Necessaries for Wife.

AWARD—Costs—12 & 13 Vict. c. 45, s. 13 361
See Costs of Arbitration. 2.

—— Sending back—Costs of arbitration - 47
See Costs of Arbitration. 1.

—— *See* Arbitration.

BANKRUPTCY—Composition deed - - 622
See Creditor's Deed.

—— Fraudulent preference—Relation back [Ex. Ch. 275
See Fraudulent Preference.

—— Plea of discharge after action brought 230
See Discharge in Bankruptcy.

BANKRUPTCY ACT, 1861: *See* Statutes—24 & 25 Vict. c. 134.

BEER—Exciseable liquor—Licence - 541
See Exciseable Liquor.

BEERHOUSE — Previous conviction — Offence against licence - - - 174
See Wine and Beerhouse Act, 1869. 2.

—— Rating for licence — "Parish or Place"—"Township" - - - 391
See "Parish or Place."

—— Wine and Beerhouse Act, 1869. - 33
See Wine and Beerhouse Act, 1869. 1.

BILL OF EXCHANGE—Traverse of indorsement—Evidence - - - - 475
See Evidence of Indorsement.

BILLIARD LICENCE—Beer—Exciseable liquor
See Exciseable Liquor. [541

BOROUGH — Sending prisoners to county gaol—Contribution to expenses - - 267
See Prison.

BREAD—*Sale otherwise than by Weight*—6 & 7 *Wm.* 4, *c.* 37, *s.* 4.] By 6 & 7 Wm. 4, c. 37, s. 4, any baker, or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, shall forfeit a certain penalty. The practice of the appellant was to sell loaves of bread at 6*d.*, varying the weight of the loaf with the price of corn. When he purposed to sell a 3½ lb. loaf for 6*d.*, the custom in his bakery was to put into the oven 4 lbs. of dough, but the loaf was not weighed after baking. The appellant sold, at 6*d.* each, six loaves, which varied in weight; but all, but one, weighed over 3½ lbs.:—*Held*, that the appellant was rightly convicted of selling bread otherwise than by weight Hill *v.* Browning [453

BREAK OF RESIDENCE—Pauper lunatic - 325
See Irremoveability. 1.

BRIBERY—Information—Election—Certificate of Commissioners - - - 377
See Corrupt Practices Prevention Acts.

BUILDING—Negligence in constructing [184, Ex. Ch. 501
See Negligence in Constructing Building.

BURGESS LIST—Municipal corporation — Mandamus - - - - 251
See Mandamus.

CANONRY—Cathedral chapter - - 196
See Cathedral Chapter.

CAPTURE — *Marine Insurance—Loss by Capture—Sale of Goods by Prize Court—Deposit of Value to prevent Sale—Total Loss—Abandonment.*] The plaintiffs insured with the defendants goods on board ship, for a voyage from L. to M. against the usual perils, including "takings at sea, arrests,

CAPTURE—*continued.*
restraints, and detainments of all kings and people." While on the voyage the ship was, on the 5th of November, 1863, seized by a cruiser of the United States of America, and taken to New Orleans, where a suit was instituted by the captors against the ship and cargo for the purpose of having them adjudged lawful prize as contraband of war. The plaintiffs, by their agents in America, did not abandon, but contested the captor's claim. On the 16th of June, 1864, the prize court gave judgment against the captors, and decreed restitution. On the 1st of July the captors appealed. On the 12th of September the plaintiffs, having been informed of the appeal, gave notice of abandonment to the defendants, which they refused to accept. On the 7th of December, 1864, and on the 9th of February, 1865, the plaintiffs gave the defendants notice that the prize commissioner had applied to the Court to decree the sale of the goods. The sale of the goods might have been prevented by depositing the full value of the goods, or giving bail for them, in the prize court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The goods had also much deteriorated in value. Neither the plaintiffs nor the defendants interfered; and on the 26th of May, 1865, the goods were sold by order of the Court. On the 15th of July, 1865, the plaintiffs, having been informed of the sale, wrote to the defendants informing them of the sale, and again giving them notice that they abandoned the goods:—*Held*, affirming the judgment of the Queen's Bench, that on the sale of the goods and after notice of abandonment, the plaintiffs were entitled to recover for a total loss. *Quære*, whether notice of abandonment was necessary. *Semble*, that it was not. Stringer *v.* The English Insurance Company [Ex. Ch. 599

CASE FOR APPEAL—County Court—Refusal of judge to sign - - - 208
See County Court Appeal.

CASES—*Bilbee* v. *London and Brighton Railway Company* (18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182) discussed - - 258
See Level Crossing.

—— *Buxton* v. *North Eastern Railway Company* (Law Rep. 3 Q. B. 549) folowed 226
See Running Powers.

—— *Great Western Railway Company* v. *Blake* (7 H. & N. 987; 31 L. J. (Ex.) 346) followed - - - - 226
See Running Powers.

—— *Hellawell* v. *Eastwood* (6 Ex. 295; 20 L. J. (Ex.) 154) discussed - - 123
See Fixtures.

—— *Reg.* v. *Freke* (5 E. & B. 944; 25 L. J. (M.C.) 64) followed - - 224
See Exemption from Toll.

—— *Reg.* v. *Hutchinson* (4 E. & B. 200; 24 L. J. (M.C.) 25) distinguished - - 437
See Application of Tolls. 2.

—— *Wood* v. *Nunn* (5 Bing. 10) approved 357
See Distress without Seizure.

CARGO "EXPECTED TO ARRIVE"—*Contract of Sale — Particular Ship.*] The defendants' correspondents at Valparaiso bought on their account 600 tons of nitrate of soda, and on the 16th of July they chartered the barque *Precursor* to bring it to England; the defendants being informed of this, on the 8th of September made the following contract, through brokers, with the plaintiff:—"We have this day sold to you about 600 tons, more or less, being the entire parcel of nitrate of soda expected to arrive at port of call per *Precursor*, at 12*s.* 9*d.* per cwt. . . . Should any circumstance or accident prevent the shipment of the nitrate, or should the vessel be lost, this contract to be void." In the meantime, on the 13th of August, an earthquake had destroyed the greater part of the nitrate of soda while lying at the port of lading; and, on the 2nd of September, the Valparaiso house had cancelled the charter of the *Precursor*. Afterwards, on learning from the defendants that they had sold the nitrate to arrive, but not on what terms, they purchased other 600 tons of nitrate at above the defendant's limit, and obtained a transfer of a charter of the same barque *Precursor*, and shipped the nitrate about the 23rd of December to the defendants, to enable them to execute their contract if obliged to do so, or to sell at a profit, if free. The *Precursor* arrived in England on the 8th of May; and the defendants, having in January sold to other parties the soda to arrive, refused to deliver to the plaintiff, on which he brought an action on the contract of the 8th of September:—*Held*, that the contract, though not for a specific lot of nitrate of soda, was for a specific adventure or voyage which both parties contemplated as about to take place; and that this second lot was not within the contract. Smith *v.* Myers - - - - 429

CATHEDRAL CHAPTER—3 & 4 *Vict. c.* 113, *s.* 25 —*Patronage of Residentiary Canonries.*] By 3 & 4 Vict. c. 113, s. 25, in the cathedral church of York, as soon as a vacancy shall occur in the deanery, and in the cathedral churches of Chichester, Exeter, Hereford, Salisbury, and Wells respectively, so soon as every person who was a member of the respective *chapters* of such churches at the passing of this Act shall cease to be such member, all the canonries shall be in the direct patronage of the Archbishop of York and of the bishops of the respective sees, who shall upon the vacancy of any canonry collate thereto a spiritual person, who shall thereupon be entitled to installation as a canon of such church. In the cathedral church of Hereford the capitular body consisted at the time of the passing of the Act of a dean and five residentiary canons, who were called the "close chapter," and twenty-two non-residentiary canons, making up the "general chapter." One of the officers in the body was the prælector, who by customary right on a vacancy succeeded to one of the residentiary canonries, and a new prælector was appointed out of the non-residentiary canons by the close chapter. The non-residentiary canons were appointed by the bishop. At York the dean alone appointed the residentiary canons from out of the non-residentiaries. Since the passing of the Act a prælector had been appointed at Hereford; and the last of those persons who were members of the close

CATHEDRAL CHAPTER—*continued.*
chapter at the passing of the statute having afterwards died, the bishop claimed under the statute to appoint direct to the vacant canonry residentiary. The prælector claimed to succeed to the vacancy on the ground that several who were members of the general chapter at the passing of the Act were still members:—*Held*, that "chapter" meant the "close chapter:" for that it was the intention of the statute to preserve the vested rights of patronage alone, without any regard to the rights of the body out of which the selection was to be made; and the residentiary canonries therefore were now in the direct patronage of the bishop. The Queen *v.* The Dean and Chapter of Hereford - - - - - - 196

CERTIFICATE—Vaccination - - 163
See Vaccination.

CERTIFICATE FOR COSTS—Arbitration - 47
See Costs of Arbitration. 1.

—— Slander - - - - - 239
See Slander.

CERTIFICATE OF COMMISSIONERS — Corrupt practices at elections - - 377
See Corrupt Practices Prevention Acts.

CERTIFICATE OF JUSTICES—Highway Act, 1864 —Appeal - - - - 87
See Highway Act, 1864. 1.

—— Notice of application—Wine and Beerhouse Act, 1869 - - - - 33
See Wine and Beerhouse Act, 1869. 1.

CERTIORARI—Discretion of Court - 466
See Highway Act, 1864. 2.

CHAPTER OF CATHEDRAL—Canonry - 196
See Cathedral Chapter.

CHARTERED FREIGHT—*Interest—Marine Insurance.*] The plaintiff, on the 7th of August, 1866, chartered his ship *C.*, "now lying at Bombay," for a voyage from Howland's Island to a port in the United Kingdom, for a full cargo of guano, freight to be paid at port of discharge; the ship to be at the island on or before the 1st of June, 1867, or the charterer to have the option of declaring the charter void. The plaintiff, on the 7th of September, 1866, effected an insurance with the defendant, at and from Bombay to Howland's Island, while there, and thence to any port in the United Kingdom, on freight chartered or otherwise, valued at 3600*l.*, in the ship *C.*; and it was made lawful for the ship to sail to, touch, and stay at any ports whatsoever, without prejudice to the insurance, which was against the usual perils. The ship sailed from Bombay, in ballast, on the 4th of October, 1866, for Howland's Island (one of the Chincha islands), intending to call at a port in New Zealand for water. She got on shore on the coast of New Zealand on the 25th of December, and was so much damaged that the plaintiff was obliged to abandon the voyage:—*Held*, that, as the ship had sailed in ballast from Bombay with the sole object of going to Howland's Island in order to earn the freight under the charter from thence to the United Kingdom, the interest in the chartered freight had commenced; and that the plaintiff could recover the loss under the policy. Barber *v.* Fleming - - 59

CHARTERPARTY—Construction—Time for discharge - - - Ex. Ch. 544
See Time for Discharge.

CHURCHWARDENS—*Liability—Fee of Registrar—Archdeacon's Visitation.*] The liability of churchwardens to pay the fee of the registrar to an archdeacon is not personal, but is contingent upon their possessing funds out of which the fees may be legally paid. Therefore, where churchwardens had no funds in their hands for the repairs of the church, or for any other expense incident to their office, except by voluntary subscriptions, and were without the means of obtaining funds:—*Held*, that they were not liable to pay the fee of the registrar due upon a visitation of the archdeacon. Veley *v.* Pertwee - - 573

CLAUSE OF RE-ENTRY—Lease—Breach of covenant - - - - Ex. Ch. 460
See Covenant not to Underlet.

CLERGYMAN—Slander—Privileged communication - - - - - 608
See Privileged Communication. 2.

COMMISSIONERS—Certificate—Bribery at elections - - - - - 377
See Corrupt Practices Prevention Acts.

COMMON LAW PROCEDURE ACT, 1852 - 26
See Statutes—15 & 16 Vict. c. 76.

COMPANY; *See* Railway Company.

COMPROMISE—Forbearance to sue—Consideration - - - - - 449
See Forbearance to Sue.

CONCEALMENT—Policy of marine insurance [Ex. Ch. 584
See "Port or Ports of Loading."

CONDITION PRECEDENT—Notices under Highway Acts—Jurisdiction of justices 466
See Highway Act, 1864. 2.

CONDUCT—Admission—Evidence - - 314
See Admission by Conduct.

CONSIDERATION—Forbearance to sue—Compromise - - - - - 449
See Forbearance to Sue.

CONSPIRACY—Evidence—Admission - 314
See Admission by Conduct.

CONSTRUCTION OF CHARTERPARTY — Time for discharge - - - Ex. Ch. 544
See Time for Discharge.

CONSTRUCTION OF POWER OF ATTORNEY — General words—Ejusdem generis 422
See Pledge by Joint Owners.

CONTRACT—Action by one on contract by two
See Joinder of Parties. [656

—— Carrier of passengers—Warranty of due care in construction of carriage - 184, [Ex. Ch. 501
See Negligence in Constructing Building.

—— Charterparty—Construction - Ex. Ch. 544
See Time for Discharge.

—— Consideration—Forbearance to sue - 449
See Forbearance to Sue.

CONTRACT—*continued.*
—— Illegality—Estoppel - - - 642
See Assignment of Debenture.
CONTRACT OF SALE—Cargo "expected to arrive" *See* Cargo "Expected to Arrive" [429
CONTRIBUTION—Tolls—Turnpike-road - 146
See Application of Tolls. 1.
CONVERSION—Pledge by joint owners—Offer to redeem - - - - 422
See Pledge by Joint Owners.
CONVICTION—Jurisdiction of justices—Title to land - - - - - 237
See Jurisdiction of Justices.
COPYHOLDS—Devise—Mandamus - - 269
See Devise of Copyholds.
CORPORATION, MUNICIPAL: *See* Municipal Corporation.
CORRUPT PRACTICES—Elections—Adjournment of Court - - - - 1
See Adjournment of Court.

CORRUPT PRACTICES PREVENTION ACTS—(15 & 16 *Vict. c.* 57, *ss.* 9 & 10; 26 & 27 *Vict. c.* 29, *s.* 7)—*Information for Bribery—Certificate of Commissioners to Witness—Staying Proceedings.*] The defendant was examined as a witness before the commissioners appointed to inquire into the existence of corrupt practices at an election of members to serve in Parliament for the city of N., and received from the commissioners a certificate under s. 7 of 26 & 27 Vict c. 29, which certified that the defendant was sworn and examined on oath before the commissioners, "and upon such examination was required by us to answer questions, his answers to which criminated or tended to criminate him, and answered all such questions; but divers of his said answers to the said questions were unsatisfactory to us, and we believe were false, and false to his knowledge." The defendant was afterwards convicted on a prosecution for bribery, and obtained a rule to stay proceedings under s. 7:—*Held*, that the defendant to entitle him to a certificate must make true answers to all questions; that the commissioners had in effect refused to certify that the defendant's answers were true, and that the certificate was not such as s. 7 required, and did not operate as a stay of proceedings. The Queen *v.* Hulme - - 377

COSTS—Appeal to quarter sessions—Enforcement of payment by warrant - 176
See Debtors Act, 1869.
—— Arbitration - - - 47, 361
See Costs of Arbitration. 1, 2.
—— County Courts Admiralty jurisdiction 418
See County Court Jurisdiction.
—— Security—Official liquidator - - 395
See Security for Costs.
—— Slander—Verdict under 40*s.* - 239
See Slander.
—— Verdict on issue going to merits - 53
See General Costs.

COSTS OF ARBITRATION—30 & 31 *Vict. c.* 142, *s.* 5—*Certificate—Discretion of Court—Sending back Award—Practice.*] An action for trespass to land was referred to an arbitrator with the powers of a judge at nisi prius, and costs of the cause to abide the event. He awarded 2*l.* 14*s.* to the plaintiff as damages, but did not certify for the plaintiff's costs in the action:—*Held*, that the Court had power, under s. 5, of 30 & 31 Vict. c. 142, to allow the plaintiff his costs.—*Held*, further, that the bare statement by the arbitrator, on a subsequent ex parte application, that he thought the plaintiff ought to have his costs was not sufficient by itself to induce the Court to allow such costs, but that under the circumstances the award ought to be sent back to the arbitrator that he might have an opportunity of certifying for costs. Harland *v.* The Mayor, &c., of Newcastle-upon-Tyne - - 47

2. —— *Arbitration—Award—Reference under* 12 & 13 *Vict. c.* 45, *s.* 13.] On an appeal to quarter sessions it was ordered, under s. 13 of 12 & 13 Vict. c. 45, that "the matter in dispute" should be referred to arbitration. The arbitrator awarded that the appeal be dismissed, and that the appellants do pay to the respondents their costs of the appeal:—*Held*, that, as the order of reference was silent as to costs, the arbitrator had no power to award costs. The West London Extension Railway Company *v.* The Fulham Union, and the Parish of Fulham - 361

COUNTY COURT APPEAL.—*Alteration by Judge of Judgment—Refusal by Judge to sign Case for Appeal—Rule* 192 *of* 1867—13 & 14 *Vict. c.* 61, *s.* 15—19 & 20 *Vict. c.* 108, *s.* 32—*Practice.*] A county court judge cannot, except by consent or after a new trial, alter a judgment which he has formally given.—By s. 15 of 13 & 14 Vict. c. 61, an appeal from a county court shall be in the form of a case agreed upon between the parties, "and if they cannot agree, the judge of the county court . . . shall settle the case and sign it." Rule 192 of the County Court Rules of 1867 provides that "all cases on appeal shall . . . be presented to the judge for signature" within a certain time, "and shall then be signed by the judge and be sealed with the seal of the Court":—*Held*, that Rule 192 is not repugnant to s. 15, and is therefore valid; and a county court judge is bound under this rule to sign and seal a case on appeal agreed on between the parties, if the case correctly states the facts and the judgment. Irving *v.* Askew - - - - 208

COUNTY COURT JURISDICTION—*Costs—Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71), *ss.* 3, 9—*Construction—Less than* 300*l.* "*recovered*" *in Admiralty Cause in* "*Superior Court*"—*Practice—Suggestion on record.*] The County Courts Admiralty Jurisdiction Act, 1868, by s. 3, gives jurisdiction to county courts to try, amongst other causes, "as to any claim for damage to cargo or damage by collision, any cause in which the amount claimed does not exceed 300*l.*"—By s. 9, if any person shall take in a "superior court" proceedings which he might, without agreement, have taken in a county court, "and shall not recover a sum exceeding the amount to which the jurisdiction of the county court in that admiralty cause is limited by this Act, . . . he shall not be entitled to costs, and shall be liable to be condemned in costs."—In an action in the Queen's Bench for damage caused by a collision between

COUNTY COURT JURISDICTION—*continued.*

the plaintiffs' and defendant's vessels in the Thames, the plaintiffs claimed over 300*l.* in their declaration and particulars of demand. The defendant paid into court 254*l.*, which the plaintiffs accepted in full satisfaction of their claim:—*Held*, that "superior court" in s. 9 means the superior courts of common law at Westminster and the Court of Chancery; that the plaintiffs' right to costs depended upon the amount "recovered" in the action, and that the 254*l.*, had been "recovered" within the meaning of s. 9, and therefore that the plaintiffs were not entitled to costs.—*Held*, further, that it was not necessary that the defendant should enter any suggestion on the record in order to deprive the plaintiffs of their costs. HEWITT *v.* CORY - - 418

—— County Court Rules, 1867—R. 192 - 208
See COUNTY COURT APPEAL.

COUNTY GAOL—Contribution to expenses of, by borough sending prisoners there - 267
See PRISON.

COURT—Adjournment—Corrupt practices at elections - - - - 1
See ADJOURNMENT OF COURT.

—— Discretion—Sending back award—Costs of arbitration - - - - 47
See COSTS OF ARBITRATION. 1.

COVENANT—"Not to permit sale by auction on premises"—Evidence of breach [Ex. Ch. 288
See EVIDENCE OF BREACH OF COVENANT.

COVENANT NOT TO UNDERLET—*Landlord and Tenant—Covenant not to assign, or part with Possession, without Licence of Landlord—Clause of re-entry for Failure in the Observance or Performance of Covenant.*] The plaintiff demised premises, in 1860, to T. and P., for fourteen years. The lease contained a covenant by the lessees not to underlet, assign, or otherwise part with possession of the premises without the written consent of the lessor; with a clause of re-entry if the lessees should fail in the observance or performance of any of their covenants. In a letter of the 25th of March, 1865, addressed to W., the plaintiff wrote:—"I consent for you to take the premises that T. and P. have been renting of me on the same conditions, and in accordance with their lease. This will be sufficient authority to T. and P. to transfer the lease to you on paying 75*l.* rent, due this day. P.S.—It will be necessary for you to write me accepting these terms." W. accepted the terms and entered into possession; but no formal assignment was executed to him by T. and P. W. paid rent to the plaintiff till January, 1867, when the plaintiff in answer to an application on behalf of W., wrote:—"I have no objection to consent to the trustees, Messrs. C. and H., acting for W. in respect of the premises to vest the same in their hands, similar to the transfer I allowed W. from T. and P.;" and accordingly, W. executed, on the 27th of February, 1867, a formal assignment, inter alia, of all his interest in the premises to C. and H. They entered on the same day; and in November, 1867, they parted with the possession to the defendant without the assent of the plaintiff. The plaintiff brought ejectment on a forfeiture for a breach of the covenant not to assign, &c., without the

COVENANT NOT TO UNDERLET—*continued.*

plaintiff's written consent:—*Held*, (affirming the judgment of the Court of Queen's Bench), that there had been no breach of the covenant.—*Quære*, whether the clause of re-entry applied only to the breach of affirmative covenants, or whether it extended to negative covenants also. WEST *v.* DOBB - - - - Ex. Ch. 460

CREDITOR'S DEED—*Surety—Right of Creditor to Composition after disputing Validity of Composition Deed—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134) *ss.* 192, 198—*Estoppel.*] W. A. White entered into a composition deed, by which it was agreed that the creditors should accept a composition of 10*s.* in the pound, secured by the joint and several promissory notes of the defendant and White; the notes to be delivered seven days after the registration of the deed; the whole of White's estate to belong to the defendant, and to be realized for his benefit. The plaintiff agreed to assent to the deed and afterwards refused to be bound by it, on the ground that his assent had been obtained by fraud. The deed was duly registered according to the Bankruptcy Act, 1861, and the promissory notes were tendered to the plaintiff, but he refused to accept them. The plaintiff then brought an action for his debt against White; he pleaded the composition deed, which was a valid deed on the face of it, and the plaintiff replied that the assents were obtained by fraud. The action was referred, and the defendant being unable to prove the sufficiency of the assenting creditors, so as to satisfy the statute, consented that an award should be made by which the verdict should be entered in the plaintiff's favour. White was afterwards adjudged bankrupt. The defendant had realized White's estate. The plaintiff then brought an action against the defendant for the amount of the promissory notes given by the defendant for the composition due to the plaintiff under the deed:—*Held*, by Cockburn, C.J., and Mellor, J., that the plaintiff was entitled to recover. By Lush, J., that the plaintiff, having successfully challenged the validity of the deed in an action, was estopped from alleging the deed was binding upon him, and therefore that he could not recover. LATTER *v.* WHITE - - - 622

CUSTOM OF MARKET—Foreign market—Purchase of goods by agent - Ex. Ch. 516
See ORDER TO PURCHASE.

CUSTOM OF STOCK EXCHANGE—*Evidence to support Contract—Sale of Shares on Stock Exchange—Liability of Jobber.*] The plaintiff, through G. & B., stockbrokers, entered into a contract with M., a stockjobber, for the sale of 280 shares in a company, for the next account day (the 27th of April). The shares were 50*l.* shares, on which 5*l.* was paid, and a call of 5*l.* was payable. As to 100 of the shares, M. arranged with the defendant that he should take in 100 shares at 3*l.* discount for M.; that is, on the name-day (the 26th of April), M. would be entitled to receive from the defendant a ticket containing the name and address of the person into whose name the shares should be transferred. M. was bound to deliver a similar ticket to G. & B. No such tickets were passed by the defendant to M. nor by M. to G. & B.; but an informal

CUSTOM OF STOCK EXCHANGE—*continued.*
memorandum was delivered by the defendant to M., and by him to G. & B., and it was arranged between G. & B. and the defendant that the delivery of the name should stand over until required by G. & B. On the 27th of April the plaintiff executed (amongst others) a transfer for 100 shares, leaving the name of the transferee in blank, and transmitted it with the certificates to G. & B. On the 30th of April G. & B. paid the call, and on that day the defendant paid them the amount of the call, the difference between the 5*l.* paid on the share and the 3*l.* discount at which he had purchased and the stamp, and G. & B. settled with M.; G. & B. handed the certificates to the defendant, but retained the transfer. On the 3rd of May certain stockbrokers agreed to take in for the defendant 100 shares, and gave him a ticket with the name of John Baptist Issaverdens, of Smyrna. The defendant delivered a ticket to G. & B. with Issaverden's name and initials, and no address, which they returned as imperfect. On the 11th of May the company stopped payment, the transfer was never registered, and a call of 5*l.* was made on the plaintiff as a contributory, which he paid, and sued the defendant to recover back the amount:—*Held* (the Court having power to draw inferences of fact), first, that there was a contract between the plaintiff through G. & B. with the defendant, that when required the defendant would deliver a name into which the shares might be transferred; secondly, that as the name which the defendant had offered to G. & B. was that of a foreigner residing abroad, he did not offer a person to whom no reasonable objection could be made; and therefore the defendant had not fulfilled the contract, and was liable to the plaintiff for the amount of call and interest as damages for the breach. ALLEN *v.* GRAVES - - 478

DEBTOR AND CREDITOR: *See* BANKRUPTCY.

DEBTORS ACT, 1869 (32 *& 33 Vict. c.* 62), *s.* 4, *sub-s.* 2—"*Default in Payment of any Sum Recoverable summarily before a Justice*"—*Costs awarded by Quarter Sessions on Appeal, enforced by Warrant of Commitment by a Justice, under* 11 *& 12 Vict. c.* 43, *s.* 27, *and* 12 *& 13 Vict. c.* 45, *s.* 5.] By the Debtors Act, 1869, s. 4, with the exceptions thereinafter mentioned, no person shall be arrested or imprisoned for making default in payment of a sum of money. There shall be excepted from the operation of the above enactment: . . . 2. Default in payment of any sum recoverable summarily before a justice or justices of the peace:—*Held*, that costs, which had been awarded by quarter sessions against one of the parties to an appeal, and which by 12 & 13 Vict. c. 45, s. 5, and 11 & 12 Vict. c. 43, s. 27, may be enforced before a justice by warrant of distress, and in default of distress by warrant of commitment, are within the above exception; and the defaulter is therefore not protected from imprisonment. THE QUEEN *v.* PRATT - 176

DEDICATION OF WAY—Limited dedication 26
See WAY, DEDICATION OF.

—— Sea-wall - - - - - 397
See SEA-WALL.

DEFAMATION — Privileged communication — Malice — Action by military officer against superior - - - 94
See PRIVILEGED COMMUNICATION. 1.

—— Privileged communication—Clergyman and parishioner - - - - 608
See PRIVILEGED COMMUNICATION. 2.

—— Slander—Costs - - - - 239
See SLANDER.

"DEFAULT IN PAYMENT OF ANY SUM RECOVERABLE SUMMARILY BEFORE A JUSTICE." - - - - 176
See DEBTORS ACT, 1869.

DELUSIONS—Lunacy - - - 549
See TESTAMENTARY CAPACITY.

DEMURRAGE—Time for discharge—Construction of charterparty - - Ex. Ch. 544
See TIME FOR DISCHARGE.

DEPOSIT—Action to recover—Race Ex. Ch. 40
See REFEREE OF RACE.

DESERTION OF WIFE—Poor—Removal - 445
See IRREMOVEABILITY. 4.

DEVIATION—Marine insurance - Ex. Ch. 584
See "PORT OR PORTS OF LOADING."

DEVISE OF COPYHOLDS—*Wills Act* (7 *Wm.* 4, *&* 1 *Vict. c.* 26), *s.* 3—*Discretion to refuse Mandamus, where inequitable to grant it.*] A testator, having been admitted to copyhold hereditaments, devised them in fee to two trustees in trust for the benefit of his family, whom he also appointed guardians to his infant son, his customary heir. The trustees proved the will, but did not claim themselves to be admitted to the copyholds, but called upon the lord of the manor to admit the infant heir by his guardians. The lord refused on account of the devise. If the two devisees had been admitted, the lord would have been entitled to a double fine instead of a single fine on the admittance of the heir. The court refused a mandamus to compel the lord to admit the heir, on the ground that it was a matter of discretion, and they would not grant the writ, as the effect of granting it would be to enable the trustees to evade payment of a double fine, and to commit a breach of trust by not acquiring themselves the legal estate. *Quære*, whether by s. 3 of the Wills Act, 7 Wm. 4, & 1 Vict. c. 26, a devise of copyholds divests the heir at once of all estate; or whether the effect of the section is only to enable a copyholder in all cases to devise his estate; dispensing with a surrender to the use of the will, and leaving the estate in the heir till the admittance of the devisee. THE QUEEN *v.* GARLAND - - - - 269

DISCHARGE IN BANKRUPTCY—*Plea—Order of Discharge after Action brought—Plea of Defence after Action—Bankruptcy Act*, 1861 (24 *&* 25 *Vict. c.* 134), *s.* 161—*Common Law Procedure Act*, 1852 (15 *&* 16 *Vict. c.* 76) *s.* 68.] By s. 161 of the Bankruptcy Act, 1861, the order of discharge shall, upon taking effect, discharge the bankrupt from all debts proveable under his bankruptcy; and if thereafter an action shall be brought against him for any such debt, he may plead in general that the cause of action accrued before he became bankrupt, and may give the Act and the special matter in evidence. The defendant was adjudged bankrupt on the 3rd of September; an action was commenced against him on the 11th of November; and on the 27th of November he obtained his order

DISCHARGE IN BANKRUPTCY—*continued.*
of discharge, and then pleaded, in the general form, that he became bankrupt before action brought, and that the cause of action accrued before the bankruptcy. Issue having been joined:—*Held*, that the plea was not proved: for that it was the order of discharge, and not the adjudication, which was the bar; and that therefore the defence arose after action brought and ought to have been pleaded according to the fact, as required by s. 68 of the Common Law Procedure Act, 1852. Jones *v.* Hill - - - - 230

DISCHARGE OF VESSEL—Time—Construction of charterparty - - - Ex. Ch. 544
See Time for Discharge.

DISCRETION—Mandamus - - - - 269
See Devise of Copyholds.

DISCRETION OF COURT—Certiorari - - 466
See Highway Act, 1864. 2.
—— Sending back award—Costs of arbitration 47
See Costs of Arbitration. 1.

DISTRESS—Railway - - - - - 306
See Distress on Railway.
—— Seizure - - - - - - 357
See Distress without Seizure.

DISTRESS ON RAILWAY—*Landlord and Tenant—Distress—Fixtures—Railway connected with Coal Mine—Tram-plates and Sleepers embedded in Ballast.*] Three railways were connected with a coal mine—one within the mine, one within a yard attached to the colliery, and the third extending from the yard and effecting a junction with a public railway. The lessee of the mine had mortgaged it to the plaintiff, who had entered into possession. The rent being in arrear, the lessor distrained, amongst other things, the three railways. The railways were constructed in the following manner:—The surface of the ground was prepared by having ballast spread upon it; sleepers were then embedded in the ballast and the ballast packed, and the rails were fastened to the sleepers by nails. In order to remove the rails, they were wrenched off the sleepers by means of bars and picks; and to remove the sleepers it was necessary to loosen the ballast by means of picks, and then with levers to raise them. The removal of the sleepers made holes in the ballast:—*Held*, that the railways, by their mode of annexation to the soil, became fixtures and were not distrainable. Turner *v.* Cameron - - - - 306

DISTRESS WITHOUT SEIZURE—*Landlord and Tenant.*] W. occupied lodgings in the defendant's house at a weekly rent. He brought a piano with him, which he had hired of the plaintiffs. The plaintiffs sent two men to fetch away the piano; the defendant's wife met the men in the passage of the house outside the room in which the piano was, and having been informed of their object, said, in the presence of W., who was at the door of the room, the piano should not leave the house unless what was owing from W. for rent and board were paid. The wife was acting by the defendant's authority, and there was rent due from W. The plaintiffs having brought an action for the conversion of the piano, the defendant justified the detention as a distress. The judge directed a verdict for the defendant:—*Held*, that there might be a distress without actual seizure, and that what had occurred amounted to a distress.—*Wood* v. *Nunn* (5 Bing. 10) approved. Cramer *v.* Mott - - - - - 357

DISTRESS WITHOUT SEIZURE—*continued.*

ELECTION OF WAYWARDEN—*Taking of Poll—25 & 26 Vict. c. 61, s. 10; 5 & 6 Wm. 4, c. 50, s. 6.*] At a meeting of the vestry of the parish, on the 25th of February, 1870, to elect a waywarden (under 25 & 26 Vict. c. 61, s. 10, and 5 & 6 Wm. 4, c. 50, s. 6), L. and C. were proposed and seconded; the majority of the ratepayers present, counting each as a single vote, were in favour of L.; but it was suggested that the votes ought to be counted by giving each ratepayer his plurality of votes; and so counting the votes, the majority were in favour of C. A poll was then demanded on behalf of L.; and a poll was appointed to be taken on the 28th of February, between ten and two o'clock, at the room in which the vestry was then being held. On the 28th, several ratepayers went to the room to vote; but in consequence of a notice that C. declined to stand, no one went into the room, and no poll whatever was taken. C. was afterwards informed, by the chairman of the meeting, that he was elected by the votes of the meeting, and the chairman gave him a certificate of his election:—*Held*, that C. was not elected; and that no poll having been taken after it had been duly demanded, the election was void. The Queen *v.* Cooper - - - - - 457

ELECTIONS—Corrupt practices—Adjournment of court - - - - - 1
See Adjournment of Court.

EMBANKMENT—Right of way—Dedication 397
See Sea-wall.

"ENGINE OR INSTRUMENT"—Taking game on Sunday - - - - - 336
See Taking Game on Sunday.

ESTOPPEL—Composition deed - - - 622
See Creditor's Deed.
—— Illegal contract - - - - - 642
See Assignment of Debenture.
—— Unpaid vendor—Property in goods - 660
See Assent to Delivery Order.

EVIDENCE—Admission by party to action that he has a bad case - - - - 314
See Admission by Conduct.
—— Breach of covenant—Forfeiture Ex. Ch. 288
See Evidence of Breach of Covenant.
—— Corrupt practices at elections—Certificate of commissioners to witness - - 377
See Corrupt Practices Prevention Acts.
—— Indorsement of bill of exchange - - 475
See Evidence of Indorsement.
—— Negligence - - - - - - 411
See Evidence of Negligence.
—— New assignment - - - - Ex. Ch. 139
See New Assignment.
—— Relevancy—Order for work - - - 285
See Relevancy of Evidence.

EVIDENCE OF BREACH OF COVENANT—*Burden of Proof—Forfeiture—Covenant "not to permit a Sale by Public Auction on the Premises without Lessor's Consent."*] The plaintiff demised a dwelling house to C., who covenanted not to permit a sale by public auction on the premises without the consent in writing of the plaintiff. C. underlet the

EVIDENCE OF BREACH OF COVENANT—*contd.*
premises to the defendant, and also assigned his goods upon the premises to three persons under a bill of sale; they sold the goods by public auction on the premises, bills being posted on the premises. In an ejectment for a forfeiture by a breach of the covenant, the above were all the facts proved, and the plaintiff was nonsuited:—*Held*, that the nonsuit was right, by Kelly, C.B., Martin, and Pigott, BB., on the ground that there was no evidence that the sale was by the permission of the lessee; by Willes, J., and Cleasby, B., on the ground that there was no evidence that the sale had taken place without the consent of the plaintiff, and that the plaintiff was bound to give some evidence of this, though a negative; by Channell, B., and Brett, J., on both grounds. Toleman *v.* Portbury - - **Ex. Ch. 288**

EVIDENCE OF INDORSEMENT—*Pleading—Evidence—Bill of Exchange—Indorser and Indorsee.*] In order to constitute a valid indorsement of a bill of exchange as against the indorser, there must be a writing of the name of the holder, and a manual delivery by him of the bill with the intention, not only to pass the property in it, but to guarantee the payment if the acceptor makes default; and evidence of facts shewing the absence of this intention is admissible under a traverse of the indorsement. Denton *v.* Peters **475**

EVIDENCE OF NEGLIGENCE—*Real Property—Fall of a Brick from a Bridge over a Highway—Railway Company.*] As the plaintiff was passing along a highway, under a railway bridge of the defendants', which was a girder bridge resting on a perpendicular brick wall with pilasters, a brick fell from the top of one of the pilasters on which one of the girders rested, and injured the plaintiff; a train had passed just previously:—*Held* (by Cockburn, C.J., and Lush, J.; Hannen, J., dissenting), that, the defendants being bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was primâ facie evidence from which the jury might infer negligence in the defendants. Kearney *v.* The London, B., and S. C. Ry. Co. - - - - - **411**

—— Railway—Level crossing - - **258**
See Level Crossing.

EXCISEABLE LIQUOR—*Beer—Billiard Licence—Beer Licence*—8 *&* 9 *Vict. c.* 109, *ss.* 10, 11.] Exciseable liquors are liquors subject to the duty of excise; and, therefore, beer, upon which an excise duty is no longer paid, is not an exciseable liquor. A. was licensed under 8 & 9 Vict. c. 109, to keep a house for billiard playing; and the licence provided that A. should not knowingly allow the consumption of exciseable liquors in the house by persons resorting thereto. He was also licensed under 3 & 4 Vict. c. 61, and 32 & 33 Vict. c. 27, to sell beer, wine, &c., to be consumed in the house. A. had allowed the consumption of beer by persons resorting to the house for the purpose of playing billiards, and was convicted of an offence against the tenor of his billiard licence:—*Held*, that A. had not been guilty of selling exciseable liquor, and was wrongly convicted. Jones *v.* Whittaker - - **541**

EXEMPTION FROM TOLL—*Turnpike—Artificial Manure in Cart of Dealer*—5 *&* 6 *Wm.* 4, *c.* 18, *s.* 1.] A waggon of the seller conveying artificial manure to the farm of the purchaser is within the exemption from turnpike toll in 5 & 6 Wm. 4, c. 18, s. 1, as "a carriage employed in conveying manure for land."—So *held*, on the authority of *Reg.* v. *Freke* (5 E. & B. 944; 25 L.J. (M.C.) 64). Foster *v.* Tucker - - - - **224**

"**FACTORY**"—Slate quarry - - - **19**
See Factory Act, 1867.

FACTORY ACT, 1867 (30 *&* 31 *Vict. c.* 103), *s.* 3, *sub-s.* 7—*Factory—Slate Quarry.*] A slate quarry, a large open space extending over an area of 400 acres, the works of which are carried on in the open air, the only buildings being sheds, and in which more than fifty persons were employed in splitting the rock into slates and shaping them for sale, is not "a factory" within the meaning of 30 & 31 Vict. c. 103, s. 3, sub-s. 7.—*Quære*, whether the process is a "manufacturing process" within the meaning of the sub-section. Kent *v.* Astley [19

FALSE IMPRISONMENT—*Arrest under ca. sa.—Judgment regularly signed, afterwards set aside.*] The defendants having issued a writ of summons against the plaintiff specially indorsed for 34*l.* under the Common Law Procedure Act, 1852, s. 25, signed judgment, under s. 27, in default of appearance for the full amount and costs, and issued a ca. sa. indorsed for that amount, under which the plaintiff was arrested and paid the sum demanded. The plaintiff then applied at chambers to set aside the judgment on the ground that 16*l.* only was due to the defendants, and the master set aside the judgment on payment of costs by the plaintiff; the plaintiff then brought an action against the defendants for false imprisonment:—*Held*, that as the judgment was regular, and as it must be taken that it was set aside as a favour to the plaintiff, and not for irregularity or any bad faith on the defendants' part, the action could not be maintained. Smith *v.* Sydney - - - - - **203**

FEE—Registrar to archdeacon—Liability of churchwardens - - - **573**
See Churchwardens.

FIXTURES—*Mortgagor and Mortgagee—Machinery attached to Premises.*] The owner in fee in possession of land and premises deposited the title deeds with a banking company as an equitable mortgage, to secure the balance of his account with them for the time being. He then erected a mill, and set up, not only steam power applicable to all mills, but machinery applicable only to the purposes of a particular manufacture which he carried on there. He afterwards made a bill of sale of all the machinery, the assignee having notice of the previous deposit of the deeds:—*Held*, as between the mortgagees and assignee, that all of the machinery which was annexed to the floor, ceilings, or sides of the building, in a "quasi permanent manner," by means of bolts and screws, passed to the mortgagees; and that it made no difference that the object of the annexation was merely to steady the machines when in use, and that they could be removed without any injury to them or the

FIXTURES—*continued.*
freehold, nor that the machines were in the nature of trade fixtures, which would, as between landlord and tenant, belong to the tenant. *Hellawell* v. *Eastwood* (6 Ex. 295: 20 L. J. (Ex.) 154), and other cases, discussed. LONGBOTTOM *v.* BERRY - - - - - 123
—— Distress—Railway - - - 306
See DISTRESS ON RAILWAY.

FORBEARANCE TO SUE—*Consideration—Compromise of Liability—Demurrer.*] The compromise of a disputed claim made bonâ fide is a good consideration for a promise, even although it ultimately appears that the claim was wholly unfounded.—Declaration, that the plaintiff had alleged that certain moneys were due to him from the Government of H., and was about to take proceedings to enforce payment, and thereupon, in consideration that the plaintiff would forbear taking such proceedings for an agreed time, the defendant promised to deliver to the plaintiff certain debentures. Breach, that defendant did not deliver the debentures.—Plea, that at the time of making the agreement no money was due to the plaintiff from the Government of H.:—*Held*, on demurrer, that the plea was no answer to the declaration. CALLISHER *v.* BISCHOFFSHEIM - - - - - 449

FORFEITURE—Breach of covenant—Evidence [Ex. Ch. 288
See EVIDENCE OF BREACH OF COVENANT.
—— Covenant not to underlet—Lease [Ex. Ch. 460
See COVENANT NOT TO UNDERLET.

FRAUDS, STATUTE OF (29 *Car.* 2, *c.* 3) *s.* 4—*Promise to be answerable for the debt or default of another, where no actual liability on part of the third person—Guarantee.*] A promise to be answerable for the debt of another person is within s. 4 of the Statute of Frauds, although that other person never becomes legally indebted to the promisee; it is sufficient to bring the promise within the statute that, at the time the promise is made, the promiser and promisee expect that a legal obligation towards the promisee will be incurred by the third person.—The plaintiff was employed to construct a main sewer by a local board of health, of which the defendant was chairman. When the sewer was nearly completed, the board gave notice to the occupiers of the adjoining houses to connect their drainage within twenty-one days, or the board would do the work at their expense. Before the twenty-one days had elapsed, the plaintiff and the defendant met; the defendant inquired, "What objection have you to make these connections?" the plaintiff said, "I have no objection to do the work if you or the local board will give the order;" the defendant replied, "You go on and do the work, and I will see you paid." The plaintiff accordingly did the work under the superintendence of the surveyor of the local board, and sent in the account to the board debiting them with the amount. The board refused payment on the ground that they had not authorized the order. And after more than two years, the amount being still unpaid, the plaintiff made a claim and brought an action against the defendant:—*Held*, that, coupling the expressions

FRAUDS, STATUTE OF—*continued.*
used with the position and conduct of the parties, the defendant's engagement did not amount to an undertaking to be primarily liable for the work, but only to a promise that, if the plaintiff would do the work on the credit of the board, the defendant would pay if the board did not; and that this was a promise to be answerable for the debt of another person within s. 4, although, in fact, the board never became indebted; and that the promise not being in writing could not be enforced. MOUNTSTEPHEN *v.* LAKEMAN - 613

FRAUDULENT PREFERENCE—*Bankruptcy—Transactions voidable at Option of Assignee—Bankrupt's own Petition—Relation.*] Where goods have been assigned to a creditor by a debtor on the eve of bankruptcy under circumstances which make it a fraudulent preference, and the goods have been sold by the creditor before the bankruptcy, it is immaterial that the adjudication was on the bankrupt's own petition, so that the fraudulent preference was not void as an act of bankruptcy to which the assignees' title could relate; the assignees may still recover the proceeds from the creditor, inasmuch as a transaction amounting to a fraudulent preference is voidable at the election of the assignees, as contrary to the spirit of the bankruptcy laws. MARKS *v.* FELDMAN - - - Ex. Ch. 275

FREIGHT, CHARTERED—Interest—Insurance
See CHARTERED FREIGHT [59

GAME—Taking on Sunday - - - 336
See TAKING GAME ON SUNDAY.

GENERAL COSTS—*Practice—Verdict on Issue going to the Merits, entitles Defendant to the General Costs, although founded on a Bad Plea.*] Declaration that the plaintiff obtained judgment and execution against B., and the defendant, as sheriff, arrested him but allowed him to escape. Pleas: 1. Not guilty. 2. That B. produced to the defendant's officer a certificate of the registration of a deed between B. and his creditors, within the meaning of s. 198 of the Bankruptcy Act, 1861, whereupon the officer discharged B. Issue joined, and demurrer to 2nd plea; and replication, that the plaintiff's cause of action against B., in respect of which judgment was recovered, first accrued after the making and after the registration of the deed, and the plaintiff was not one of the creditors of B. bound by the deed. Issue joined on the replication, and demurrer. Judgment was given on the demurrers, that the 2nd plea was bad in substance, and the replication good. A verdict was afterwards found for the plaintiff of not guilty, the jury assessing the damages at the amount of the judgment debt; and the Court afterwards, on the facts, directed the verdict on the replication to the 2nd plea to be entered for the defendant:—*Held*, that the defendant was entitled to the postea, and to have the judgment entered for him; for that it was immaterial that the 2nd plea appeared on the record as bad, as the replication and verdict cured the defect, and shewed that the defendant had succeeded on the merits. DIGNAM *v.* BAILY 53

GUARANTEE—Statute of frauds - - 613
See FRAUDS, STATUTE OF.

HIGHWAY—Dedication—Sea-wall - 397
See Sea-wall.

—— Dedication—Limited - - - 26
See Way, Dedication of.

—— Election of waywarden - - 457
See Election of Waywarden.

—— Liability to repair—"Highway repairable by inhabitants at large" - - 218
See Road, Liability to Repair.

—— Negligence - - - - 411
See Evidence of Negligence.

—— Order that parish shall cease to be liable to repair highway—Appeal - - 87
See Highway Act, 1864. 1.

HIGHWAY ACT, 1835 - - - 87
See Statutes—5 & 6 Will. 4, c. 50.

HIGHWAY ACT, 1864 (27 & 28 *Vict. c.* 101), *s.* 21 *—Highway—Order that Parish shall cease to be liable to Repair Highway—Certificate of Justices —Appeal—Highway Act*, 1835 (5 & 6 *Wm.* 4, c. 50), *ss.* 84, 85, 88, 91—*Construction*—"*Like proceedings.*"] The Highway Act, 1835, s. 84, enacts, that when the inhabitants in vestry shall deem it expedient that any highway should be stopped up, application may be made to two justices to view the same. By s. 85, when it shall appear upon such view that such highway is unnecessary, the justices, after the giving of certain notices, &c., shall proceed to certify the fact of their having viewed the highway, and the certificate shall state that the highway is unnecessary, and shall be lodged with the clerk of the peace for the county, and enrolled amongst the records of the court of quarter sessions. By s. 88, when any such certificate shall have been given, any person who may think that he would be injured if such highway should be stopped up, may make complaint thereof by appeal to the quarter sessions. By s. 91, if no appeal is made, or if one is made and dismissed, the quarter sessions shall make an order to stop up such highway; and the proceedings thereupon shall be binding and conclusive upon all persons.—By s. 21 of the Highway Act, 1864, when any highway board consider any highway unnecessary for public use, they may apply to two justices to view the same, "and thereupon the like proceedings shall be had as when application is made under the Highway Act, 1835, to procure the stopping up of any highway, save only that the order to be made thereupon, instead of directing the highway to be stopped up, shall direct that the same shall cease to be a highway which the parish is liable to repair, and the liability of the parish shall cease accordingly; and for the purpose of such proceedings under this enactment such variation shall be made in any notice, certificate, or other matter preliminary to the making of such order, as the nature of the case may require:"—*Held*, that the words "like proceedings" in s. 21 of the Highway Act, 1864, include all the proceedings contained in s. 85 of the Highway Act, 1835, for the purpose of procuring the stopping up of a highway, and also those proceedings designated by the general name of appeal to quarter sessions, given by s. 88 of the same Act. The Queen *v.* The Justices of Surrey - - - 87

HIGHWAY ACT, 1864—*continued.*

2. —— *Certificate that Highway unnecessary —5 & 6 Wm. 4, c. 50, s. 85—Notices Condition precedent to Justices' Jurisdiction — Certiorari, where a Discretionary Writ—Party aggrieved.*] There were three roads, each in a different parish, running from three turnpike roads, and forming, by their junction together, a figure like a capital Y. The three limbs met at D, and the ends of the limbs met the turnpike roads at A, B, and C. On application by the highway board of the district two justices made a separate certificate as to each road (under 27 & 28 Vict. c. 101, s. 21, which incorporates 5 & 6 Wm. 4, c. 50, ss. 84—91), that the road from D to A, from D to B, and from D to C, was unnecessary. These certificates were affirmed on appeal by orders of quarter sessions, and it was ordered that the roads should cease to be repaired by the parishes.—E., an inhabitant of one of the parishes, and living in the neighbourhood of the roads, obtained a rule for a certiorari to bring up the orders and certificates for the purpose of quashing them on the ground that they were void by reason of the notices not having been affixed at the places required by law.—By 5 & 6 Wm. 4, c. 50, s. 85, after their view and before making their certificate, the justices are to direct the surveyor to affix a notice in form No. 19 at the place and by the side of *each end* of the highway from whence the same is proposed to be diverted or stopped up, &c., *and such notices having been published*, and proof thereof given, the justices shall proceed to certify.—A notice had been posted at A, B, C, respectively, but no notice at all had been posted at D.:—*Held*, that the actual publication of the prescribed notices at *each end* of the road to be dealt with was a condition precedent to the jurisdiction of the two justices; and that, although the roads formed one system, yet each of the roads having been treated as a separate road, this condition had not been fulfilled, and the orders were therefore void as made without jurisdiction. — *Held*, also, that, though a certiorari is not a writ of course, yet as the applicant had by reason of his local situation a peculiar grievance of his own, and was not merely applying as one of the public, he was entitled to the writ ex debito justitiæ. The Queen *v.* The Justices of Surrey - - - 466

"**HIGHWAY REPAIRABLE BY INHABITANTS AT LARGE**" - - - 218
See Road, Liability to Repair.

HUSBAND AND WIFE—Necessaries—Lunacy of husband - - - - 51
See Necessaries for Wife.

—— Poor—Relief to wife without husband 151
See Relief to Wife without Husband.

—— Poor—Removal of wife without husband 79
See Removal of Irish Pauper.

—— Poor—Removal of wife in absence of husband
See Irremoveability. 2. [364

ILLEGALITY—Contract—Estoppel - 642
See Assignment of Debenture.

IMPRISONMENT, FALSE—Arrest under ca. sa. —Judgment set aside - - 203
See False Imprisonment.

INDORSEMENT—Bill of exchange—Traverse—Evidence - - - - 475
See Evidence of Indorsement.

INFORMATION FOR BRIBERY—Election—Certificate of commissioners - - 377
See Corrupt Practices Prevention Acts.

INSANITY : *See* Lunacy.

"INSTRUMENT"—Taking game on Sunday 336
See Taking Game on Sunday.

INSURANCE : *See* Marine Insurance.

INTEREST—Marine insurance—Chartered freight *See* Chartered Freight. [59

IRREMOVEABILITY—*Poor—Pauper Lunatic—Removal—Irremoveability by Residence—Break of Residence—Removal of Pauper while Insane—9 & 10 Vict. c.* 66, *s.* 1; 16 *& 17 Vict. c.* 97, *ss.* 97, 102 *—Practice, on Case from Quarter Sessions.*] E. M., a single woman, aged twenty-eight, having resided in the R. union as a domestic servant more than a year, was suddenly seized with mania on the 16th of September; the next day her mother fetched her away from her master's house (he paying the wages up to that day), and took her to her parents' residence in the S. union. She remained with her parents one night, and the next day was taken to the S. union-house; and on the 26th of September she was sent to the county lunatic asylum as a pauper lunatic, where she still remained, having continued insane from her first seizure. E. M.'s settlement was in the W. union:—*Held*, that the order for her maintenance, under 16 & 17 Vict. c. 97, ss. 97, 102, ought to be on the R. union and not on the W. union; for that the lunatic, having acquired a status of irremoveability by a year's residence in R., her mere bodily removal, while she was unable to exercise any will of her own, was no break of the residence.—A case from quarter sessions comes before the Court of Queen's Bench on a rule to quash the order of sessions, and the party supporting the order of sessions, therefore, begins by shewing cause against the rule to quash. The Queen *v.* The Whitby Union - - 325

2. —— *Poor—Irremoveability by reason of Residence—Removal of Married Woman, in the absence of Husband who has no Settlement—9 & 10 Vict. c.* 66, *s.* 1—*11 & 12 Vict. c.* 111, *s.* 1.] A woman, having a settlement in parish L., but having resided for more than a year in parish G., married a foreign sailor having no settlement. They resided together in parish G. until he left in the usual course of his occupation as a sailor, intending to return, but not having made any provision for the wife's maintenance. She continued to reside in parish G., and became chargeable thereto. At this time the husband had not resided one year in the parish:—*Held*. that the woman was irremoveable under 9 & 10 Vict. c. 66, s. 1, and 28 & 29 Vict. c. 79, s. 8, by reason of her continuous residence before and during marriage; and that she was not affected by the proviso in 11 & 12 Vict. c. 111, s. 1. The Queen *v.* St. George-in-the-East, - - - - 364

3. —— *Poor—Irremoveability by Reason of Residence—Animus Revertendi—9 & 10 Vict. c.* 66, *s.* 1.] W. H. was the illegitimate son (born in 1847 at R.) of a single woman, who married in 1858, and he lived with his mother and her husband, and was maintained by them. They had lived for more than a year in the parish of L. on the 5th of August, 1862, when W. H. was elected a pupil at "the School for the Indigent Blind," in another union, being then about fifteen years and six months old. The school was a charitable institution supported by voluntary contributions; the pupils were lodged, and clothed, and fed, as well as taught, out of the funds of the institution. The pupils were discharged by the committee when they were sufficiently instructed, or when they attained twenty-one years, or for misconduct. W. H. remained and continually resided at the school as a pupil until the 19th of July, 1868, when he was discharged, being more than twenty-one years old. During his residence at the school he was wholly maintained, clothed, lodged, and fed out of the school funds, and neither his mother nor her husband contributed to his support; but he went to them at L., and lodged with them for five weeks in the summer of each of the years 1863, 1864, and 1865, and for six weeks in the summers of 1866 and 1867, and during those periods he was maintained by his mother and her husband. On his discharge from the school in July, 1868, W. H. returned to his mother and her husband at L., and was maintained by them till March, 1869, when he became chargeable to L. He had no other settlement than his birth settlement. —On appeal against an order for the removal of W. H. to his place of settlement, the quarter sessions drew the inference from the above facts that there was an animus revertendi in W. H.; and they held that he had constructively resided with his mother and her husband in L. for more than a year, and was therefore irremoveable:—*Held*, that the sessions were justified in deciding that the pauper had continued to reside with the parents and was irremoveable. The Queen *v.* Abingdon Union 406

4. —— *Poor—Irremoveability by Residence—Desertion of Wife and Children—24 & 25 Vict. c.* 55, *s.* 3.] About thirteen years ago, in consequence of a quarrel, a man separated from his wife and daughter, and took other lodgings in the same parish, where he cohabited with another woman, by whom he had children, and resided with them up to the present time. The wife, shortly after the separation, having become chargeable to the parish, the man, under threat of legal proceedings by the parish officers, paid her 2*s.* 6*d.* a week. The wife afterwards removed with the daughter (who was eighteen years old, unemancipated, and had no settlement of her own), to another parish, where the allowance by the husband was continued, and where, after residing more than one year, mother and daughter became chargeable:—*Held*, that the conduct of the man amounted to a desertion of his wife within the meaning of 24 & 25 Vict. c. 55, s. 3, and that the wife was therefore irremoveable; but that the daughter was removeable to her father's place of settlement, as the mother, by the desertion, did not become the head of the family. The Queen *v.* St. Mary, Islington - - - 445

JOBBER—Stock Exchange custom - - 478
See Custom of Stock Exchange.

JOINDER OF PARTIES—*Action by one on Contract by two for Benefit of one—Nominal Partnership—Principal and Agent—Set-off.*] Spurr, an attorney, practised under the firm of "Spurr and Chambers." Chambers, although an attorney, was not, in fact,

JOINDER OF PARTIES—*continued.*
a partner of Spurr, but only a clerk. Cass was a client of the nominal firm, and owed a bill of costs; and Spurr was personally liable to Cass on a bill of exchange of less amount than the bill of costs. Spurr, without joining Chambers, sued Cass for the amount of the bill of costs; and Cass pleaded never indebted, and set off the sum due on the bill of exchange. Cass brought a cross action on the bill of exchange, and Spurr set off the amount of the bill of costs. The two actions being tried together it was found by the jury that Chambers had authorized Spurr to contract on behalf of himself and Chambers with Cass, and that Spurr had so contracted.—*Held*, that Spurr being the real principal, might take the benefit of the contract with Cass and sue alone, and set off the bill of costs in the action against him. Spurr *v.* Cass. Cass *v.* Spurr - - 656

JOINT TENANCY—Pledge by joint owners of chattel—Offer to redeem - - 422
See Pledge by Joint Owners.

JUDGMENT — Alteration—County court appeal
See County Court Appeal. [203
—— Ca. sa.—Judgment set aside - - 203
See False Imprisonment.

JURISDICTION — Inferior tribunal declining—Mandamus - - - - 251
See Mandamus.

JURISDICTION OF JUSTICES—*Summary Conviction on Charge of Assault—Jurisdiction ousted by Question as to Title to Land—Excess of Force in Assertion of Right*—24 & 25 *Vict. c.* 100, *ss.* 42, 46.] On the hearing of a complaint for an assault, under 24 & 25 Vict. c. 100, s. 42, if it be shewn that a bonâ fide question as to title to land is involved, the jurisdiction of the justices is at once ousted by s. 46, which provides that nothing in the Act shall authorize justices to hear and determine any case of assault in which any question shall arise as to the title to any lands, &c.; and the justices cannot proceed to inquire into and determine by summary conviction any excess of force alleged to have been used in the assertion of title. The Queen *v.* Pearson - - 237
—— Highway Acts—Notices - - 466
See Highway Act, 1864. 2.

JURISDICTION OF REFEREE—Boat race Ex. Ch.
See Referee of Race. [40

JUSTICE—Jurisdiction—Title to land - 237
See Jurisdiction of Justices.
—— Jurisdiction—Highway Acts - - 466
See Highway Act, 1864. 2.
—— Notice of application for certificate—Wine and Beerhouse Act, 1869 - - 33
See Wine and Beerhouse Act, 1869. 1.

LAND—Title—Jurisdiction of justices - 237
See Jurisdiction of Justices.
—— Use as a railway - - - 157
See "Land used as a Railway."

"LAND USED AS A RAILWAY"—*Local Government Act*, 1858 (21 & 22 *Vict. c.* 98), *s.* 55—*Rating of Land "used only as a Railway constructed under the Powers of an Act of Parliament for Public Conveyance."*] A railway, originally constructed without any parliamentary powers, and afterwards sold to a railway company under an Act of Parliament, and enlarged and used for public traffic under the provisions of that Act, and of the General Statutes for regulating railways, does not come within the meaning of s. 55 of the Local Government Act, 1858, of "land used only as a railway constructed under the powers of any Act of Parliament for public conveyance;" and is therefore rateable to a general district rate in the full net annual value. The North Eastern Railway Company *v.* The Local Board of Leadgate 157

LANDLORD AND TENANT — Covenant not to underlet, assign, &c., without licence [Ex. Ch. 460
See Covenant not to Underlet.
—— Covenant not to permit sale by auction on premises - - - Ex. Ch. 288
See Evidence of breach of Covenant.
—— Distress—Railway - - - 306
See Distress on Railway.
—— Distress without seizure - - 357
See Distress without Seizure.

LANDS CLAUSES ACT, 1845:
See Statutes—8 & 9 Vict. c. 18.

LANDS CLAUSES ACT, 1869:
See Statutes—32 & 33 Vict. c. 18.

LEASEHOLD—Abstract of title on sale - 213
See Title to Leasehold.

LEVEL CROSSING — *Railway Company — Evidence of Negligence—Private Road.*] The plaintiff, while passing along an occupation road which crossed the defendants' railway on a level, was knocked down and injured by a train of the defendants, owing, as was alleged, to the defendants' negligence. There were gates across the road left unfastened, and the defendants had at one time kept a gatekeeper, but had ceased to keep one some time before the accident. About three years before the accident the defendants had obtained powers under an Act to make a new road and discontinue the level occupation road; the powers of the Act were to be exercised within five years, and then to cease; and nothing had been done as to the road till after the accident.—The jury negatived negligence in the driver of the engine; but found for the plaintiff on the ground generally of "negligence as to the crossing." The judge, in summing up, had left to the jury as evidence of negligence in the defendants, inter alia, the omission to keep a gatekeeper, and the omission to exercise the powers of their Act:—*Held*, a misdirection.—*Bilbee* v. *London and Brighton Ry. Co.* (18 C. B. (N. S.) 584; 34 L. J. (C.P.) 182) commented upon and explained. Cliff *v.* The Midland Railway Company 258

LIABILITY—Churchwardens—Fee of Registrar—Archdeacon's visitation - - 573
See Churchwardens.
—— Jobber—Stock Exchange - - 478
See Custom of Stock Exchange.

LIBEL—Privileged communication—Officer in army - - - - - 94
See Privileged Communication. 1.

LICENCE—Beerhouse—Rating—"Parish or place"
See "Parish or Place." [391
—— Wine and Beerhouse Act, 1869—Previous conviction—Second offence - 174
See Wine and Beerhouse Act, 1869. 2.

"LIKE PROCEEDINGS" - - - 87
See Highway Act, 1864. 1.

LIMITED DEDICATION—Highway - 26
See Way, Dedication of.

LIQUIDATOR, OFFICIAL: *See* Official Liquidator.

LOCAL BOARD OF HEALTH—Liability to repair "highway repairable by inhabitants at large" - - - - - 218
See Road, Liability to Repair.

LOCAL GOVERNMENT ACT, 1858 - -
See Statutes—21 & 22 Vict. c. 98.

LOSS—Marine insurance—Capture—Sale of goods—Abandonment - - Ex. Ch. 599
See Capture.

LUGGAGE, PASSENGERS—Railway - 241
See Passengers' Luggage.

LUNACY—Necessaries for wife of lunatic 51
See Necessaries for Wife.

—— Partial unsoundness of mind—Delusions 549
See Testamentary Capacity.

—— Pauper—Removal - - - 325
See Irremoveability. 1.

MACHINERY—Fixtures—Mortgage - 123
See Fixtures.

MALICE—Libel—Privileged communication—Action by military officer against his superior - - - - 94
See Privileged Communication 1.

MANDAMUS—*Municipal Corporation—Burgess List—Notice of Objection—Description of Person objected to—Description of Objector—5 & 6 Wm. 4, c. 76, s. 17, Sch. D.—Declining of Jurisdiction by Inferior Tribunal.*] A notice of objection, under 5 & 6 Wm. 4, c. 76, s. 17, and Sch. D. 3, to a person on the burgess list of a borough, need not specify the parish in which the objector's qualifying property is situate; nor the nature of the property in respect of which the person objected to is rated. — The mayor and assessors of a borough, at a court for the revision of the burgess list, holden between the 1st and 15th of October, the time limited by s. 18, erroneously determined that certain notices of objection were invalid, and refused to inquire into the qualifications of the persons objected to:—*Held*, that the mayor and assessors had declined jurisdiction; and the Court granted a mandamus commanding them to hold a court to revise the list, although the time limited had elapsed. The Queen *v.* The Mayor, &c., of Monmouth. The Queen *v.* The Mayor, &c., of Bolton - 251

—— Discretion to refuse - - - 269
See Devise of Copyholder.

—— Illegal contract - - - 642
See Assignment of Debenture.

MARINE INSURANCE—Construction of policy [Ex. Ch. 584
See "Port or Ports of loading."

—— Interest—Chartered freight - - 59
See Chartered Freight.

—— Loss by capture—Sale of goods—Abandonment - - - - Ex. Ch. 599
See Capture.

MARINE INSURANCE—*continued.*

—— Valued policy—Total loss - - 244
See Valued Policy.

MASTER OF VESSEL—Duty—Damage to cargo
See Perils of the Sea. [346

"MEDICINE"—Pharmacy Act, 1868 - 296
See Pharmacy Act, 1868.

METROPOLITAN BUILDING ACT, 1855.
See Statutes—18 & 19 Vict. c. 122.

MORTGAGE—Fixtures—Machinery - 123
See Fixtures.

MUNICIPAL CORPORATION — Burgess list — Mandamus - - - - 251
See Mandamus.

NECESSARIES FOR WIFE—*Authority of Wife when Husband a Lunatic.*] The plaintiff sued the defendant for repairs done to the inside of the defendant's house which he held on a long lease. The orders were given by the defendant's wife, who was residing with her children in the house, the defendant being at the time a lunatic and in an asylum. After some of the repairs had been done, the plaintiff became aware that the defendant was a lunatic; but he continued to do the repairs under the wife's direction. The repairs were necessary for the house; but after paying for the defendant's maintenance in the asylum, the wife received the whole of the defendant's income, and had also an allowance from friends of the defendant, and what she received was sufficient for all purposes, including the repairs to the house:—*Held*, that the defendant was not liable; for that the authority of a wife to pledge her husband's credit was no greater in the case of a lunatic than in the ordinary case of husband and wife. Richardson *v.* Du Bois - - 51

NEGLIGENCE—Construction of building [184, Ex. Ch. 501
See Negligence in Constructing Building.

—— Evidence - - - - 258, 411
See Level Crossing — Evidence of Negligence.

—— Railway—Running powers - - 226
See Running Powers.

NEGLIGENCE IN CONSTRUCTING BUILDING—*Undertaking of Person receiving Money for a Place in a Building to view a Public Exhibition—Implied Undertaking that the Building is fit for the purpose.*] A man, who causes a building to be erected for viewing a public exhibition and admits persons on payment of money to a seat in the building, impliedly undertakes that due care has been exercised in the erection, and that the building is reasonably fit for the purpose; and it is immaterial whether the money is to be appropriated to his own use or not. The defendant, acting on behalf of himself and others interested in certain races, entered into a contract with E., who was a competent person to be so employed, to erect for them a grand stand for the purpose of viewing the races; and the defendant employed a person, who received 5*s.* (to be appropriated to the race fund) from every person admitted. The stand was negligently and improperly constructed (but not to the knowledge of the defendant), and, in consequence, fell and injured the plaintiff, who

NEGLIGENCE IN CONSTRUCTING BUILDING—*continued.*

was one of the persons so admitted:—*Held*, that the plaintiff could maintain an action against the defendant for the damage sustained, although the defendant was personally free from negligence, and had employed a competent person to erect the stand. Francis *v.* Cockrell **184, Ex. Ch. 501**

NEW - ASSIGNMENT — *Pleading — Evidence — Common Law Procedure Act*, 1852 (15 & 16 *Vict. c.* 76), *ss.* 51, 79, 87.] In a declaration for breaking and entering certain land of the plaintiff, the abuttals of which were set out, and breaking to pieces the plaintiff's gates standing on the land, the defendant pleaded a right of way, and justified the breaking of the gates because they were across the way and obstructing it. The plaintiff joined issue. At the trial the defendant proposed to give evidence of a right of way over the plaintiff's land. The plaintiff admitted the right of way, and offered to prove that the trespasses were committed off the admitted right of way, and also that there were no gates across it, but that there were gates on that portion of the plaintiff's land which had been trespassed upon: The judge ruled that, it being admitted that a right of way existed over the land, the defendant was entitled to a verdict:—*Held* (affirming the judgment of the Court of Queen's Bench), that, the plaintiff not having new-assigned, the evidence tendered by him was inadmissible. Huddart *v.* Rigby **Ex. Ch. 139**

NON-JOINDER — Action by one on contract by two - - - - - - **656**
See Joinder of Parties.

NOTICE—Highway Act, 5 & 6 Wm. 4, c. 50—Jurisdiction of justices - - **466**
See Highway Act, 1864. 2.

NOTICE OF APPLICATION—Certificate of justices—Wine and Beerhouse Act. 1869 - **33**
See Wine and Beerhouse Act, 1869. 1.

NOTICE OF OBJECTION—Burgess list—Municipal corporation - - - **251**
See Mandamus.

NUISANCES REMOVAL ACT, 1855 and 1860 15
See Statutes—18 & 19 Vict. c. 121—23 & 24 Vict. c. 77.

OFFICIAL LIQUIDATOR—Action by—Security for costs - - - - - **395**
See Security for Costs.

ORDER TO PURCHASE—*Order by Merchant to Commission Agent Abroad for Purchase of Goods, Construction of—Custom or Course of Business—Principal and Agent—Vendor and Vendee.*] The defendant, a merchant in Liverpool, in July wrote to the plaintiffs, commission agents, in Mauritius:—"My opinion is, that, should the beet crop prove less than usual, there may be a good chance of something being made by importing cane sugar at about the limit I am going to give you as a maximum, say, 26*s.* 9*d.* (for Nos. 10 to 12), and you may ship me 500 tons, to cover cost freight and insurance. Fifty tons more or less, of no moment, if it enables you to get a suitable vessel. . . . I should prefer the option of sending vessel to London, Liverpool, or the Clyde; but, if that is not compassable, you may ship to either Liverpool or London." The defendant also afterwards sent a telegram, which was received by the plain-

ORDER TO PURCHASE—*continued.*

tiffs with the letter on the 24th of August:—"If possible, the ship to call for orders for a good port in the United Kingdom." The plaintiffs wrote in reply, "We note that you authorize us to purchase and ship on your account a cargo of about 500 tons, provided we can obtain Nos. 10 to 12, at a cost not exceeding 26*s.* 9*d.* per ton on board, including freight and insurance, and your remarks regarding the destination of the vessel have also our attention." When a commission agent at the Mauritius receives instructions from England to purchase so large a quantity as 500 tons of sugar of a specified quality within a prescribed limit, it is generally impossible for him to purchase the whole at one time, or at one price, or from one seller, and it is generally necessary for him to purchase it at different times and in different lots or parcels. The plaintiffs so purchased about 400 tons, and shipped them to the defendant about the end of September, being then unable to get any more within the defendant's limit; in the meantime, prices having gone down in England, the defendant wrote a countermand of his order, which the plaintiffs received on the 20th of October. On the arrival of the 400 tons in England, the defendant refused to accept them on the ground that his order had not been complied with:—*Held* (reversing the judgment of the Court of Queen's Bench), by Kelly, C.B., Martin, and Channell, BB., and Keating, J. (Montague Smith, J., and Cleasby, B., dissenting); that the order contained in the defendant's letter was for a single cargo of 500 tons in a single ship, and that the order being an unambiguous one, the custom or course of business at the Mauritius could not affect the construction to be put upon it; and that the defendant's purchase and shipment of 400 tons were not in compliance with the order. Ireland *v.* Livingston - - - - - - **Ex. Ch. 516**

"OWNER"—*Metropolitan Building Act* (18 & 19 *Vict. c.* 122), *ss.* 3, 51—*Liability to Fees to Surveyor.*] In 1866, notice was given by a builder to the district surveyor, of his intention to erect three houses, under *s.* 38 of 18 & 19 Vict. c. 122 (the Metropolitan Building Act). The surveyor inspected the houses, and the roofs were covered in on the 9th of July, 1866, and on the 9th of August, 1866, the surveyor became entitled to certain fees from the "builder, owner, or occupier," under *s.* 51. T. first became owner in 1869; and the surveyor, after due demand, took out a summons against T. for the fees:—*Held*, that "owner" meant owner for the time being when the fees became due; and that T. was, therefore, not liable. Tubb *v.* Good **443**

"PARISH OR PLACE"—*Beerhouse—Amount of Rating required for Licence—"Township"*—3 & 4 *Vict. c.* 61, *s.* 1.] By 3 & 4 Vict. c. 61, *s.* 1, no licence to sell beer or cider by retail shall be granted in respect of any dwelling house which shall not be rated to the relief of the poor of the parish, township, or place in which such house is situate, on a rent or annual value of 15*l.* at least, if situate in any city, cinque port, town corporate, parish, or place, the population of which exceeds 10,000. By the interpretation clause, "parish or place" includes any township or place

"PARISH OR PLACE"—*continued.*
separately maintaining its own poor. A house was situated in and rated, at less than 15*l.* annual value, to the poor rate of a township, which separately maintained its own poor, and had a population under 10,000; but the township formed part of a very extensive parish which had a population exceeding that number:—*Held*, that the population of the larger district and not that of the rating area governed the amount of rating, and that the house being situate in a parish of which the population exceeded 10,000, rating under 15*l.* was insufficient. PRESTON *v.* BUCKLEY - 391

PARLIAMENT—Adjournment of court—Corrupt practices at elections - - 1
See ADJOURNMENT OF COURT.

PARTIES TO ACTION—Action by one on contract by two - - - - - 656
See JOINDER OF PARTIES.

PARTNERSHIP—Action by one on contract by two
See JOINDER OF PARTIES. [656

PASSENGER—Railway—Negligence - 226
See RUNNING POWERS.

PASSENGER'S LUGGAGE—*Railway Company—Carriers.*] The plaintiff gave his portmanteau to his servant to take with him by the defendants' railway from N. to L., he intending himself to travel by a later train. The servant took, and paid the defendants for, a ticket from N. to L., and delivered to the defendants the plaintiff's portmanteau and his own luggage as his (the servant's) ordinary luggage, each passenger being entitled to take with him his ordinary luggage, not exceeding a certain weight, free of charge: and the defendants received the portmanteau as such ordinary luggage. The plaintiff travelled as a passenger from N. to L. by a later train on the defendants' line, without any luggage. The portmanteau having been lost during the journey by the defendants' default:—*Held*, that the plaintiff could not maintain an action against the defendants for the loss. BECHER *v.* THE GREAT EASTERN RAILWAY COMPANY - - 241

PAUPER LUNATIC—Removal - - 325
See IRREMOVEABILITY. 1.

PAWN—Joint owners of chattel—Offer to redeem
See PLEDGE BY JOINT OWNERS [422

PAYMENT—Auctioneer - - - - - 340
See AUCTION.

PERILS OF THE SEA—*Duty of Master or Shipowner as to Goods damaged on the Voyage.*] The plaintiffs shipped beans on the defendant's ship, under a bill of lading, to be carried from Alexandria to Glasgow, deliverable to the plaintiffs' order on payment of freight by consignees. At Liverpool the ship met with damage by collision, and was obliged to put in to repair; the beans were wetted by sea water in consequence of the collision, and the repairs only taking a few days, there was no time to have taken out the beans, dried, and reshipped them; but the plaintiffs, being at Liverpool and hearing of the disaster, objected to the beans being taken on in their then condition, and the defendants' agent proposed to them to receive the beans at Liverpool on payment of the whole freight. The plaintiffs were ready to receive the beans, but refused to pay more than freight pro ratâ to Liverpool; consequently, the beans were taken on as they

PERILS OF THE SEA—*continued.*
were. Damage from collision was one of the excepted perils:—*Held*, that the plaintiffs were entitled to recover for the damage to the beans occasioned by their having been carried on in their wet condition: for that the defendants were not justified in taking on goods contrary to the express commands of the shipper, and sacrificing them merely for the purpose of earning the freight. NOTARA *v.* HENDERSON - - 346

PHARMACY ACT, 1868 (31 *& 32 Vict. c.* 121), *s.* 17—*Sale of "Poison"—"Medicine"—Bonâ fide compliance with proviso in s.* 17.] By s. 17 of the Pharmacy Act, 1868, it shall be unlawful (under certain penalties on conviction) to sell any poison, unless the box, vessel, &c., in which it is contained be distinctly labelled with the name of the article, and the word "poison," and with the name and address of the seller of the poison: it shall be unlawful to sell any of the poisons in the first part of sch. A. (prussic acid being one) to any person unknown to the seller, unless introduced by some person known to the seller; . . . but none of the provisions of this section shall "apply to any medicine supplied by a legally qualified apothecary to his patient, nor to any article when forming part of the ingredients of any medicine dispensed by a person registered under this Act; provided such medicine be labelled in manner aforesaid with the name and address of the seller, and the ingredients thereof be entered, with the name of the person to whom it is sold or delivered, in a book to be kept by the seller for that purpose." The appellant, a person registered under the Act, was charged with contravening the enacting part of the section. It appeared at the hearing that J., a person unknown to the appellant, and not introduced by any person known to him, came into the appellant's shop, and asked to have a prescription made up, which was written, in pencil, in the usual style of medical prescriptions, and had "Mrs. Newton" at the bottom, as the person for whose use it was intended, and the initials "R. M. L.," which were the initials of a legally qualified medical practitioner. The appellant dispensed the prescription by putting two drachms of prussic acid into a 2 oz. bottle and filling it up with rose water, according to the meaning of the prescription; and the appellant copied the prescription into a book, in which he entered all the prescriptions he made up with the name "Mrs. Newton." J. took the bottle, and paid the appellant's demand. The bottle was labelled with the name and address of the appellant distinctly written. The prescription was one that might be ordered for a lotion. There was no evidence whether there was or was not such a person as Mrs. Newton; but the appellant bonâ fide and reasonably believed that a medical man had prescribed the lotion for a Mrs. Newton, and that she was the person for whose use he was selling it:—*Held*, that the medicine or lotion was a medicine within the meaning of the exception in s. 17, "of medicine dispensed by a registered person;" that the case was therefore taken out of the enacting part of the section as to poisons; that the appellant had complied with the proviso; and was, therefore, not liable to be convicted. *Semble*, that there cannot be two separate convictions

PHARMACY ACT, 1868—*continued.*
under different parts of the enactment for one and the same act. Berry *v.* Henderson 296
PIERS OF HARBOUR—Poor rate - - 489
See Rating of Piers of Harbour.
PLEADING—After action brought—Discharge in bankruptcy - - - - 230
See Discharge in Bankruptcy.
—— Joinder—Action by one on contract by two
See Joinder of Parties [656
—— New assignment—Common Law Procedure Act, 1852, ss. 51, 79, 87 - Ex. Ch. 139
See New Assignment.
—— Practice: *See* Practice.
—— Traverse of indorsement - - 475
See Evidence of Indorsement.
PLEDGE BY JOINT OWNERS—*Conversion—Four Joint Owners of Chattel—Offer to redeem by Assignee of Interest of Three of the Four—Demand by Assignee—Refusal of Pledgee to Deliver Goods to Assignee—Construction of Power of Attorney—General Words—Ejusdem generis.*] Four partners pledged goods with the defendant, with a power of sale, as security for repayment of advance made by the defendant to them. Afterwards the partnership was dissolved, and the property of three of the four partners vested in the plaintiff under several deeds of assignment. The plaintiff, without authority from the fourth partner, tendered to the defendant the amount for which the goods were a security, and demanded the whole of the goods. The defendant refused to deliver the goods to the plaintiff:—*Held*, that the refusal by the defendant was not such a conversion of the goods as would entitle the plaintiff to maintain an action of trover against the defendant. P., a partner in the firm of B. W. & Co., gave A. a power of attorney "for the purposes of exercising, for me, all or any of the powers and privileges conferred by an indenture of partnership constituting the firm of B. W. & Co.;" and the power afterwards went on, "and generally to do, execute, and perform any other act, deed, matter, or thing whatsoever . . . in or about my concerns, engagements, and business of every nature and kind whatsoever":—*Held*, that the former words restrained the generality of the latter words, and consequently that A. could not under this power execute a deed in P.'s name dissolving the partnership of B. W. & Co., and assigning over P.'s share of the partnership property. Harper *v.* Godsell - - - - - - 422
"POISON"—Pharmacy Act, 1868 - - 296
See Pharmacy Act, 1868.
POLICY—Marine—Construction - Ex. Ch. 584
See "Port or Ports of Loading."
POLICY, VALUED—Marine insurance—Total loss - - - - - - 244
See Valued Policy.
POOR—Rate—Piers of harbour - - 489
See Rating of Piers of Harbour.
—— Relief to husband without wife—Order on husband - - - - - 151
See Relief to Wife without Husband.
—— Removal — Irremoveability by reason of residence - - - - - 406
See Irremoveability. 3.
POOR—*continued.*
—— Removal—Lunatic - - - 325
See Irremoveability. 1.
—— Removal—Residence - - - 445
See Irremoveability. 4.
—— Removal of wife in absence of husband 364
See Irremoveability. 2.
—— Removal of wife without husband - 79
See Removal of Irish Pauper.
—— Settlement by paying taxes - - 371
See Settlement by paying Taxes.
POOR RATE—Rateable property—Piers of harbours - - - - - 489
See Rating of Piers of Harbour.
"PORT OR PORTS OF LOADING"—*Marine Insurance—Construction of Policy—Concealment—Deviation.*] The plaintiffs, in 1861, effected with the defendant a policy of insurance on bone and bone ash on board a certain vessel, at and from Buenos Ayres, and port or ports of loading in the province of Buenos Ayres, to port or ports of call and discharge in the United Kingdom. The plaintiffs knew, at that time, that the vessel was going from Buenos Ayres to L., a port in the province, to complete her cargo; but this fact was not communicated to the defendant, and he did not know that L. was a port in the province. L. was a place where a trade in hides, bone, and bone ashes was carried on between that place and Buenos Ayres; but vessels could not clear from L. to Europe, but had to return to Buenos Ayres to obtain a clearance. There was no artificial port, but only a roadstead protected by natural headlands, forming a kind of bay. L. was unknown in 1861 to underwriters as a place of loading; and if underwriters, on a policy as above, had been informed that the vessel was going to load there they would have required a higher premium than the defendant charged. The vessel went from Buenos Ayres to L., but being unable to get cargo, she left that place to return to Buenos Ayres, and was lost on her way thither:—*Held* (reversing the judgment of the Queen's Bench), that the non-communication of the fact that the vessel was going to L. to complete her cargo. was a concealment of a material fact which vitiated the policy.—*Held* (by Kelly, C.B., Channel and Pigott, BB., Byles and Brett, JJ.; Martin and Cleasby, BB., and Willes, J., dissenting), affirming the judgment of the Queen's Bench, that L. was a port of loading within the policy.—*Held*, also, by Cleasby, B., that the return of the vessel from L. to Buenos Ayres was a deviation. Harrower *v.* Hutchinson - - Ex. Ch. 584
POWER OF ATTORNEY—Construction—General words—Ejusdem generis - - 422
See Pledge by Joint Owners.
PRACTICE—Appearance to writ in person 76
See Appearance to Writ in Person.
—— Arrest under judgment afterwards set aside
See False Imprisonment. [203
—— Case from Quarter Sessions - - 325
See Irremovability. 1.
—— County Court Appeal—Alteration by judge of judgment - - - 208
See County Court Appeal.
—— County Court—Costs—Suggestion - 418
See County Court Jurisdiction.

PRACTICE—*continued.*
—— General Costs—Verdict on issue going to merits - - - - 53
See General Costs.
—— Mandamus—Discretion - - 269
See Devise of Copyholds.
—— Pleading: *See* Pleading.
—— Security for Costs—Official liquidator 395
See Security for Costs.
—— Sending back award—Discretion of Court—Costs of arbitration - - 47
See Costs of Arbitration. 1.

PREFERENCE, FRAUDULENT: *See* Fraudulent Preference.

PRESUMPTION—Dedication of way—Public way
See Sea-wall. [397

PREVIOUS CONVICTION—Vaccination - 163
See Vaccination.
—— Wine and Beerhouse Act, 1869—Second offence - - - - 174
See Wine and Beerhouse Act, 1869. 2.

PRINCIPAL AND AGENT: *See* Agent.

PRISON—*Contribution by Borough sending Prisoners to County Gaol—Expenses of Enlargement of Prison—5 & 6 Vict. c.* 98, *s.* 18—28 *& 29 Vict. c.* 126, *ss.* 23, 24.] A borough sending its prisoners to the county gaol, without any special contract, is liable, under 5 & 6 Vict. c. 98, s. 18, to pay a proportion of the expenses of the enlargement of the prison necessary in order to conform to the requirements of 28 & 29 Vict. c. 126. The Queen *v.* The Mayor, &c., of Wigan - - 267

PRIVATE ROAD—Level crossing—Railway 258
See Level Crossing.

PRIVILEGED COMMUNICATION—*Libel—Malice—Action by a Military Officer against his Superior Officer.*] Plea to a declaration for libel, that the defendant was the superior officer of the plaintiff, and the plaintiff was under his command, and it was the defendant's duty as such superior officer to forward to the adjutant-general of the army letters written and sent to him as such superior officer, in relation to their military conduct, duties, and qualifications by the officers under his command, and to make, for the information of the commander-in-chief, reports in writing to the adjutant-general on the subject of such letters: that the defendant, as such superior officer, had received from the plaintiff letters in relation to his military duties and to certain orders received by him as such officer, and which the plaintiff requested might be forwarded by the defendant to the adjutant-general; and the defendant, in the course of military duty and as an act of military duty, forwarded the letters to the adjutant-general; and for the information of the commander-in-chief, when forwarding such letters, the defendant made certain reports in writing in relation to the letters of the plaintiff, which was the libel complained of. Replication, that the libel was written by the defendant of actual malice, and without any reasonable, probable, or justifiable cause, and not bonâ fide, or in the bonâ fide discharge of the defendant's duty as such superior officer. On demurrer:—*Held*, by Mellor and Lush, JJ., that the replication was bad: for that no action would lie against a military officer for an act done in the ordinary course of his duty as such officer,

PRIVILEGED COMMUNICATION—*continued.*
even if done maliciously and without reasonable or probable cause.—Cockburn, C.J., dissenting, and holding, that an action would lie if the reports, though made under the circumstances alleged in the plea, were made of actual malice and without reasonable and probable cause. Dawkins *v.* Paulet - - - - - 94

2. —— *Slander — Parishioner and Clergyman.*] When words imputing misconduct, of which two persons are alleged to have been jointly guilty, are spoken to one of them under circumstances which make the communication privileged as to him, the slanderous statement is privileged as to the other, and the latter cannot maintain an action for defamation.—The defendant mentioned to the rector of her parish a rumour that she had heard publicly uttered, impugning his conduct and the conduct of his solicitor, the plaintiff, in the administration of a certain trust. The plaintiff having brought an action for slander against the defendant, the jury found that the words complained of were spoken bonâ fide and without malice, under the belief that it was important for the defendant's rector to know the rumour, in order that he might clear his character:—*Held*, that upon this finding, the communication was privileged: and that the privilege extended to the alleged slander of the plaintiff, as the communication could not be made without mentioning him. Davies *v.* Snead - - - - - - 608

PRIZE COURT—Sale of goods—Marine Insurance—Loss by capture - - Ex. Ch. 599
See Capture.

PUBLIC HEALTH ACT, 1848: *See* Statutes—11 & 12 Vict. c. 63.

QUARRY—Slate—Factory Act, 1867 - 19
See Factory Act, 1867.

QUARTER SESSIONS—Costs—Appeal—Enforcement of payment by warrant - 176
See Debtors Act, 1869.
—— Practice on case from - - - 325
See Irremoveability. 1.

RACE—Boat race - - - Ex. Ch. 40
See Referee of Race.

RAILWAY—Distress—Fixtures - - 306
See Distress on Railway.
—— Land used as a railway—Rateability 157
See Land used as a Railway.

RAILWAY COMPANY—Evidence of Negligence
See Evidence of Negligence. [411
—— Negligence—Running powers - 226
See Running Powers.
—— Negligence—Level crossing - - 258
See Level Crossing.
—— Passenger's luggage - - - 241
See Passenger's Luggage.

RATE IN AID—Turnpike road—Tolls—Apportionment - - - - 146
See Application of Tolls. 1.

RATEABLE PROPERTY—Piers of harbour 489
See Rating of Piers of Harbour.

RATING—Beerhouse—Licence - - 391
See "Parish or Place."
—— Land used as a railway - - 157
See Land used as a Railway.

RATING OF PIERS OF HARBOUR—*Poor-rate—Rateable Property.*] By 56 Geo. 3, c. lxxxi., certain commissioners were appointed for improving the harbour of New Shoreham. By s. 26 the property of all the wharves, quays, buildings, . . . and of all works erected in and about the harbour, in pursuance of the Acts, were vested in the commissioners. By s. 27 the commissioners were required to deepen, cleanse, scour, and enlarge the channel of the harbour, and to make new piers, with the necessary wharfing, to confine the channel opposite to and near the intended entrance into the harbour. By s. 83, after the piers and other works had been made, there was to be paid by every person, who should import or export any merchandise within the limits of the harbour, certain duties.—The commissioners enlarged the channel so as to make a new entrance in the harbour, and built new piers, as authorized, and received duties on all merchandise brought into the harbour:—*Held*, that the soil in the channel was not vested by the statute in the commissioners, and they were not the occupiers so as to be rateable to the relief of the poor: that the soil on which the piers were built was vested in them, and that they were the occupiers of the piers, but their occupation was not sufficiently connected with earning the duties to make them rateable in respect of the piers. The Commissioners, &c., of New Shoreham *v.* The Overseers of Lancing. [489

REAL PROPERTY—Negligence - - - 411
See Evidence of Negligence.

"RECOVERED"—County Court - - 418
See County Court Jurisdiction.

REFEREE OF RACE—*Decision of Arbitrator, when final—Boat race—Jurisdiction of Referee—Action to recover deposit.*] The plaintiff deposited a stake with the defendant with a view to a race between the plaintiff and K., upon the terms "that the race was to be a right-away sculler's race, and the decision of the referee to be final." In such races, the start is made by the men themselves, but if they fail to start through default of either or both, the referee has power to interfere. There was a default in the start, and the referee, who was stationed at some distance from the starting-post, ordered that K. should inform the plaintiff that if he did not start K. was to row over the course without him. K. rowed over the course without having communicated this order to the plaintiff or given him any opportunity of starting, and the referee, without inquiry or communication with the plaintiff, ordered the stakes to be paid to K. An action having been brought by the plaintiff to recover his deposit:—*Held* (affirming the judgment of the Court of Queen's Bench) that, as the order of the referee was conditional upon its being communicated to the plaintiff, the order not having been communicated, there never was such a start or race as was contemplated; the referee's jurisdiction to award the stakes, therefore, did not attach, and his decision was not final, and the plaintiff was entitled to recover. Sadler *v.* Smith [Ex. Ch. 40

REGISTRAR—Archdeacon—Liability of churchwardens to pay fee - - - - 573
See Churchwardens.

REGULÆ GENERALES, 1869 & 1870:
See Page 669.

RELATION BACK — Bankruptcy — Fraudulent preference - - - Ex. Ch. 275
See Fraudulent Preference.

RELEVANCY OF EVIDENCE—*Evidence to charge Defendant with Work done by Plaintiff to Houses, that the Defendant had given Orders to other Persons about same Houses.*] On the trial of an action by the plaintiff against the defendant for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the houses or the real principal, evidence is admissible that other persons had received orders from the defendant to do work at the same houses, without shewing that the plaintiff knew of these orders at the time he did his work. Woodward *v.* Buchanan - - - - - 285

RELIEF TO WIFE WITHOUT HUSBAND—*Poor—Order on Husband towards Wife's maintenance, under* 31 & 32 *Vict. c.* 122, *s.* 33—*Offer of Husband to maintain Wife at his House.*] By 31 & 32 Vict. c. 122, s. 33, when a married woman requires relief without her husband, the guardians of the union or parish to which she becomes chargeable may apply to justices in petty sessions, and the justices may summon the husband to appear before them to shew cause why an order should not be made upon him to maintain his wife; and upon his appearance, or on proof of service of the summons, they may, after hearing the wife, or on such other evidence as they may deem sufficient, make an order upon him to pay such sum weekly towards the cost of the relief of the wife as, after consideration of all the circumstances of the case, shall appear to them proper.—A man having been summoned under the above section, it appeared that his wife had left him sixteen years before on account of his ill-usage, from the effects of which she was still suffering; and she had lately received parish relief, and was still chargeable. The husband had not contributed to her support during the separation, but had applied to her to return to cohabitation. At the hearing he offered to receive her back at his house, and promised not to ill-use her. But she refused to return on account of the brutality she had previously received. The justices were satisfied by evidence that it was dangerous to the health of the wife to return to cohabitation; and they made an order on the husband to pay a weekly sum towards the relief of the wife:—*Held*, that the order was rightly made, notwithstanding the husband's offer, as the justices had found, in effect (which was a question for them), that the wife was justified in leaving and refusing to return to the husband's house. Thomas *v.* Alsop - 151

REMOVAL OF IRISH PAUPER—*Poor—Removal of Wife without Husband—*8 & 9 *Vict. c.* 117, *s.* 2.] Application was made to justices for the removal of a married woman and her two children from the parish of L., where they had become chargeable, to her birthplace in Ireland. The husband was also Irish, and neither of them had acquired any settlement in England; the children were the issue of the marriage, were unemancipated, and were also born in Ireland. The wife and children had been deserted by the husband; and

REMOVAL OF IRISH PAUPER—*continued.*
it was not known where he was living:—*Held*, that the wife and children could not be removed to Ireland under 8 & 9 Vict. c. 117, s. 2, without the husband, who was the head of the family. The Poor Law Commissioners of Ireland *v.* The Select Vestry of Liverpool - - - 79

REPAIRS—Highway—Action for non-repair 218
Road, Liability to Repair.

RES JUDICATA—Application for certificate of justices—Wine and Beerhouse Act, 1869 [33
See Wine and Beerhouse Act, 1869. 1.

RESIDENCE—Poor—Removal - - - 406, 445
See Irremovability. 3, 4.

ROAD, LIABILITY TO REPAIR—*Highway—Local Board of Health—Liability to Action for Non-repair of a Road—Public Health Act*, 1848 (11 & 12 *Vict. c.* 63), *s.* 68—"*Highway Repairable by Inhabitants at large*"—15 & 16 *Vict. c.* 42, *s.* 13.] An action for personal injuries sustained by one of the public owing to the non-repair of a highway, does not lie against a local board of health constituted under the Public Health Act, 1848. By s. 13 of 15 & 16 Vict. c. 42, the term "highway" in s. 68 of the Public Health Act, 1848, by which highways are vested in the local board, shall mean "any highway repairable by the inhabitants at large":—*Held*, that the words "repairable by the inhabitants at large" are used in contradistinction to repairable by individuals ratione tenuræ; and that on demurrer to a declaration alleging it was the duty of a local board to repair a public footpath, it must be taken that it was a highway repairable by the inhabitants at large. Gibson *v.* The Mayor, &c. of Preston - - - - - - 218

RULES—Regulæ Generales, 1869 & 1870:
See Page 669.

RUNNING POWERS—*Railway Company—Negligence—Liability of Railway Company to Passenger for Accident caused by Negligence of a Company over whose Line they have Running Powers.*] The plaintiff took a ticket of the defendants, a railway company, to be carried as a passenger from A. through B. to C. At B. the defendants' line joins the line of the T. V. Company, over which the defendants have running powers from B. to C. on the payment of certain tolls; the whole of the traffic arrangements over the T. V. line being left by the special Act in the control of the T. V. company. After leaving B., the train of the defendants in which the plaintiff rode ran into a train of the T. V. Company, and the plaintiff was injured by the collision. The defendants' servants were not negligent; and the collision was owing to the negligence of the servants of the T. V. Company, in sending on their own train without the proper tail light, and allowing the defendants' train to proceed on the same line of rails too soon after the other train, without giving any warning to the driver of the defendants' train:—*Held*, on the authority of *Great Western Ry. Co.* v. *Blake* (7 H. & N. 987; 31 L. J. (Ex.) 346), and *Buxton* v. *North Eastern Ry. Co.* (Law Rep. 3 Q. B. 549), that the defendants were liable for the negligence of the T. V. Company. Thomas *v.* The Rhymney Railway Company - - - - 226

SALE, CONTRACT OF: *See* Contract of Sale.

SALE OF BREAD—Sale otherwise than by weight [453
See Bread.

SALE OF GOODS—Auction—Action by auctioneer [340
See Auction.

—— Prize court—Marine insurance—Loss by capture - - - - Ex. Ch. 599
See Capture.

—— Property—Estoppel—Vendor and purchaser [660
See Assent to Delivery Order.

SALE OF "POISON"—Pharmacy Act, 1868 296
See Pharmacy Act, 1868.

SALE OF SHARES—Stock exchange—Custom [478
See Custom of Stock Exchange.

SANITARY ACT, 1866 (29 & 30 *Vict. c.* 90), *ss.* 14 & 21—*Nuisances Removal Act*, 1855 (18 & 19 *Vict c.* 121), *s.* 12—*Nuisances Removal Act*, 1860 (23 & 24 *Vict. c.* 77), *s.* 13—*Complaint as to Nuisance by an Inhabitant.*] By 18 & 19 Vict. c. 121, s. 12, the local authority may cause complaint to be made of a nuisance, and the justices may order an abatement of it; by 23 & 24 Vict. c. 77, s. 13, upon complaint before a justice by any inhabitant of any place of the existence of a nuisance in the place, the justice may issue a summons requiring the person by whose act the nuisance arises to appear before two justices, who shall have power to inquire into the complaint, and act with relation thereto as in cases where complaint is made by a local authority under s. 12 of 18 & 19 Vict. c. 121, and as if the person making complaint were such local authority. By 29 & 30 Vict. c. 90, s. 14, part 2 (ss. 14-34) of the Act is to be construed as one with the above statutes; and by s. 21, the nuisance authority shall, previous to taking proceedings before a justice under s. 12 of 18 & 19 Vict. c. 121, serve a notice on the person by whose acts the nuisance arises, to abate the same within a time to be specified in the notice:—*Held*, that notice was not necessary before laying a complaint by an inhabitant. Cocker *v.* Cardwell - - - 15

SEA-WALL—*Embankment, Right of Way along—Presumption of Dedication from Public User.*] There is nothing inconsistent with the purposes of a sea or river wall or embankment, erected to protect neighbouring lands, in a right of way along the surface; and the same evidence of user will raise a presumption of a dedication of a right of way by the owner of the soil in the case of such an embankment as in any other case of uninterrupted and open user by the public. The Board of Works for the Greenwich District *v.* Maudslay - - - - - - 397

SECOND INFORMATION—Previous conviction—Vaccination - - - - - 163
See Vaccination.

SECURITY FOR COSTS—*Practice—Action by Official Liquidator, in Name of an Unlimited Company being Wound up.*] Where a company, registered as an unlimited company, is being wound up, and an action is brought in the name of the company, under the directions of the official liquidator, against a debtor of the company, the Court will not make an order that the plaintiffs give security for the defendants' costs.

SECURITY FOR COSTS—*continued.*
The United Ports, &c., Insurance Company *v.* Hill - - - - - - 395
SEIZURE—Distress - - - - - 357
See Distress without Seizure.
SENDING BACK AWARD—Discretion of court—Costs of arbitration - - 47
See Costs of Arbitration. 1.
SET-OFF—Action by one on contract by two
See Joinder of Parties. [656
SETTLEMENT BY PAYING TAXES — *Poor — 3 Wm. & Mary, c.* 11, *s.* 6—*Borough Improvement Rate and Lamp Rate.*] Under a local Act, commissioners were authorized to levy rates for paving and lighting the streets, &c., within the city of E., on the several owners and occupiers of all houses within the city. The commissioners were empowered to appoint two or more of the inhabitants of each parish in the city to be assessors of the rates, and the assessors were required to make the rates and the commissioners were to settle and sign the same. The commissioners were also to appoint the overseers of the respective parishes to collect the rates. The rates were made and collected in each parish by the assessors and collectors as required by the Act. T. occupied a house in a parish in the city for one year, at a yearly rent above 10*l.*, and paid his share of the rates made under the local Act:—*Held*, that these rates were public taxes of the parish within the meaning of 3 Wm. & Mary, c. 11, s. 6, and that T. had acquired a settlement in the parish. The Queen *v.* Saint Thomas Union [371
SHARES—Sale—Stock exchange—Custom 478
See Custom of Stock Exchange.
SHIP—Construction of charterparty—Time for discharge - - - Ex. Ch. 544
See Time for Discharge.
—— Damage to cargo - - - 346
See Perils of the Sea.
—— Sale of cargo "expected to arrive" - 429
See Cargo "Expected to arrive."
SHIPOWNER—Duty—Damage to cargo 346
See Perils of the Sea.
SLANDER—*Costs—Verdict under* 40*s.*—21 *Jac.* 1, *c.* 16, *s.* 6—*Effect of Certificate of Judge under* 3 *& 4 Vict. c.* 24, *s.* 2, *and* 30 *& 31 Vict. c.* 142, *s.* 5.] In an action of slander imputing felony to the plaintiff, the jury gave a verdict for 1*s.*, and the judge certified, under 3 & 4 Vict. c. 24, s. 2, that the slander was wilful and malicious, and under 30 & 31 Vict. c. 142, s. 5, that there was sufficient reason for bringing the action in the superior courts:—*Held*, that the plaintiff was not entitled to costs: for that by 21 Jac. 1, c. 16, s. 6, which was unrepealed, the plaintiff, having obtained a verdict for less than 40*s.*, was only entitled to as much costs as damages; and the subsequent statutes were in the negative, and therefore only enabled the judge or court to certify for or allow such costs as the plaintiff was entitled to before the statutes passed. Marshall *v.* Martin - - - - - - 239
—— Privileged communication—Parishioner and clergyman - - - - 608
See Privileged Communication. 2.
SLATE QUARRY—Factory Act, 1867 - 19
See Factory Act, 1867.
STATUTE OF FRAUDS - - - 613
See Frauds, Statute of.
STATUTES:
21 Jac. 1, c. 16, s. 6 - - - 239
See Slander.
29 Car. 2, c. 3, s. 4 - - - - 613
See Frauds, Statute of.
3 W. & M. c. 11, s. 6 - - - 371
See Settlement by Paying Taxes.
1 & 2 Wm. 4, c. 32 - - - - 336
See Taking Game on Sunday.
5 & 6 Wm. 4, c. 18, s. 1 - - - 224
See Exemption from Toll.
—— —— c. 50, s. 6 - - - 457
See Election of Waywarden.
—— —— s. 85 - - - - 466
See Highway Act, 1864. 2.
—— —— ss. 84, 85, 88, 91—Highways 87
See Highway Act, 1864. 1.
—— —— s. 94 - - - - 437
See Application of Tolls. 2.
—— c. 76, s. 17, Sch. D. - - - 251
See Mandamus.
6 & 7 Wm. 4, c. 37, s. 4 - - - 453
See Bread.
7 Wm. 4 & 1 Vict. c. 26, s. 3 - - 269
See Devise of Copyholds.
3 & 4 Vict. c. 24, s. 2 - - - 239
See Slander.
—— c. 61, s. 1 - - - - 391
See "Parish or Place."
—— c. 113, s. 25 - - - - 196
See Cathedral Chapter.
4 & 5 Vict. c. 59 - - - - 146
See Application of Tolls. 1.
5 & 6 Vict. c. 98, s. 18 - - - 267
See Prison.
8 & 9 Vict. c. 117, s. 2 - - - 79
See Removal of Irish Pauper.
—— c. 109, ss. 10, 11 - - - 541
See Exciseable Liquor.
9 & 10 Vict. c. 66, s. 1 - - 325, 364, 406
See Irremoveability. 1, 2, 3.
11 & 12 Vict. c. 63, s. 68 - - - 218
See Road, Liability to Repair.
—— c. 111, s. 1 - - - - 364
See Irremoveability. 2.
12 & 13 Vict. c. 45, s. 13 - - - 361
See Costs of Arbitration. 2.
13 & 14 Vict. c. 61, s. 15 - - - 208
See County Court Appeal.
15 & 16 Vict. c. 42, s. 13 - - - 218
See Road, Liability to Repair.
—— c. 57, s. 4 - - - - 1
See Adjournment of Court.
—— —— ss. 9, 10 - - - - 377
See Corrupt Practices Prevention Acts.
—— c. 76, ss. 30, 31 - - - 76
See Appearance to Writ in Person.
—— —— ss. 51, 79, 87 - - Ex. Ch. 139
See New Assignment.

STATUTES—*continued.*
15 & 16 Vict. c. 76, s. 68 - - - 230
See Discharge in Bankruptcy.
16 & 17 Vict. c. 97, ss. 97, 102 - - 325
See Irremoveability. 1.
18 & 19 Vict. c. 121, s. 12 - - - 15
See Sanitary Act, 1866.
—— c. 122, ss. 3, 51 - - - 443
See "Owner."
19 & 20 Vict. c. 108, s. 32 - - - 208
See County Court Appeal.
21 & 22 Vict. c. 98, s. 55 - - - 157
See Land used as a Railway.
23 & 24 Vict. c. 77, s. 13 - - . 15
See Sanitary Act, 1866.
24 & 25 Vict. c. 55, s. 3 - - - 445
See Irremoveability. 4.
—— c. 100, ss. 42, 46 - - - 237
See Jurisdiction of Justices.
—— c. 134, s. 161 - - - - 230
See Discharge in Bankruptcy.
—— —— ss. 192, 198 - - - 622
See Creditors' Deed.
25 & 26 Vict. c. 61, s. 10 - - - 457
See Election of Waywarden.
26 & 27 Vict. c. 29, s. 7 - - - 377
See Corrupt Practices Prevention Acts.
27 & 28 Vict. c. 101, s. 21 - - 87, 466
See Highway Act, 1864. 1, 2.
28 & 29 Vict. c. 126, ss. 23, 24 - - 267
See Prison.
29 & 30 Vict. c. 90, ss. 14 and 21 - - 15
See Sanitary Act, 1866.
30 & 31 Vict. c. 84, ss. 18, 31, 34 - 103
See Vaccination.
—— c. 103, s. 3, sub-s. 7 - - - 19
See Factory Act, 1867.
—— c. 142, s. 5 - - - - - 47
See Costs of Arbitration. 1.
31 & 32 Vict. c. 71, ss. 3, 9 - - 418
See County Court Jurisdiction.
—— c. 121, s. 17 - - - - 296
See Pharmacy Act, 1868.
—— c. 122, s. 33 - - - - 151
See Relief of Wife without Husband.
32 & 33 Vict. c. 18, s. 1 - - - 333
See Arbitration under Lands Clauses Act, 1869.
—— c. 2, ss. 27, 8 - - - - 33
See Wine and Beerhouse Act, 1869. 1.
—— —— s. 17 - - - - 174
See Wine and Beerhouse Act, 1869. 2.
—— c. 62, s. 4, sub-ss. 2 - - - 176
See Debtors Act, 1869.
STAYING PROCEEDINGS—Corrupt practices at elections—Certificate of commissioners
See Corrupt Practices Prevention Acts. [377
STOCK EXCHANGE—Contract - - 479
See Custom of Stock Exchange.
SUGGESTION ON RECORD—County Courts—Costs - - - - 418
See County Court Jurisdiction.
SUMMARY CONVICTION—Jurisdiction of justices—Title to land - - - 237
See Jurisdiction of Justices.
SUNDAY—Taking game - - - - 336
See Taking Game on Sunday.
"SUPERIOR COURT"—County Courts Admiralty Jurisdiction Act, 1868 - - 418
See County Courts Jurisdiction.
SURETY—Composition deed - - 622
See Creditor's Deed.

TAKING GAME ON SUNDAY—*Using Engine or Instrument on Sunday*—*1 & 2 Wm. 4, c. 32.*] By 1 & 2 Wm. 4, c. 32, s. 3, "if any person shall kill or take any game, or use any dog, gun, net, or other engine or instrument of destruction for the purpose of killing or taking any game on a Sunday," he shall, on conviction, be liable to a penalty.—The appellant was convicted for that he, on the 15th of August (being Sunday), did use snares for the purpose of killing game. He set the snares on the 13th and 14th of August, and on the 15th the snares were seen set ready to catch game, and two dead grouse were found caught in snares:—*Held*, that a snare was an engine or instrument within the meaning of the section, and that putting down a snare on a day before Sunday, for the purpose of killing game, and keeping it set on Sunday, was using an engine or instrument on Sunday. Allen *v.* Thompson - - - - - 336

TAKING OF POLL—Election of waywarden 457
See Election of Waywarden.
TAXATION OF COSTS—Arbitration by agreement under Lands Clauses Act, 1845 - 333
See Arbitration under Lands Clauses Act, 1845.
TAXES—Poor—Settlement - - - 371
See Settlement by paying Taxes.

TESTAMENTARY CAPACITY—*Partial Unsoundness of Mind—Mental Delusions.*] Partial unsoundness, not affecting the general faculties, and not operating on the mind of a testator in regard to testamentary disposition, is not sufficient to render a person incapable of disposing of his property by will.—At a trial as to the validity of a will, in favour of the testator's niece, it appeared that the testator made the will in 1863; he had been confined as a lunatic for some months in 1841; and he remained subject to delusions, that he was personally molested by a man who had long been dead, and that he was pursued by evil spirits whom he believed to be visibly present; and these delusions were shewn to have existed between 1841 and the date of the will, and also between that date and his death in 1865. As to the testator's general capacity to manage his affairs, &c., the evidence was contradictory; but it was admitted that at times he was incapable of making a will. The jury were directed to consider whether, at the time of making the will, the testator was capable of having such a knowledge and appreciation of facts, and was so far master of his intentions, free from delusions, as would enable him to have a will of his own in

TESTAMENTARY CAPACITY—*continued.*
the disposition of his property, and act upon it; and they were further directed that the mere fact of the testator's being able to recollect things, or to converse rationally on some subjects, or to manage some business, would not be sufficient to shew he was sane; while, on the other hand, slowness, feebleness, and eccentricities would not be sufficient to shew he was insane; and that the whole burden of shewing that the testator was fit at the time was on the party claiming under the will:—*Held*, that the direction was practically right; for that it was immaterial whether the delusions remained latent or not at the time, if the testator was otherwise competent to make a will, as neither of the delusions—the dead man being in no way connected with the testator—had, or could have had, any influence upon him in disposing of his property. Banks *v.* Goodfellow - - - - - - 549

TIME FOR DISCHARGE—*Ship—Charterparty—Contract implied where Charterparty silent—Demurrage—Vis major.*] Where a charterparty provides that the ship shall proceed to a certain port, and there, or so near thereto as she can safely get, deliver the cargo in the usual and customary manner, the contract to be implied is, that the shipowner and charterer will each use reasonable diligence in performing that part of the delivery which, by the custom of the port, falls upon him; and, inasmuch as the discharge is a joint act of both parties, neither party can sue the other for delay arising from a cause over which he had no control.—Where, therefore, a ship, under such a charterparty, was in the course of unloading, and, owing to a threatened bombardment of the port, the authorities there refused for several days to allow any more of the cargo to be landed, the shipowner cannot recover damages from the charterer for the delay. Ford *v.* Cotesworth - - - - Ex. Ch. 544

TITLE TO LAND—Jurisdiction of justices 237
See Jurisdiction of Justices.

TITLE TO LEASEHOLD—*Vendor and Purchaser—Abstract of Title—Non-production of Lease more than Sixty Years Old.*] Upon a sale of leasehold property without any condition protecting the vendor against the production of deeds, the vendor is bound to produce the lease which is the root of his title, although the lease is more than sixty years old. Frend *v.* Buckley - Ex. Ch. 213

TOLL—Turnpike—Exemption—Artificial manure
See Exemption from Toll. [224

—— Turnpike—Application - 146, 437
See Application of Tolls. 1, 2.

TOTAL LOSS—Marine Insurance—Sale of goods by Prize Court—Abandonment
See Capture. [Ex. Ch. 599

—— Valued policy—Rights of underwriters 244
See Valued Policy.

TROVER: *See* Conversion.

"TOWNSHIP"—Beerhouse—"Parish or place"—Rating - - - - 391
See "Parish or Place."

TURNPIKE—Exemption from toll—Artificial manure - - - - 224
See Exemption from Toll.

TURNPIKE TRUST—Tolls—Application 146, 437
See Application of Tolls. 1, 2.

UNPAID VENDOR—Estoppel—Property in goods
See Assent to Delivery Order. [660

USAGE—Custom of market 478 Ex. Ch. 516
See Custom of Stock Exchange; Order to Purchase.

USER—Dedication of way—Presumption - 397
See Sea-Wall.

VACCINATION—*Second Information—Previous Conviction—Certificate that the Child is not in a fit state to be successfully Vaccinated*—30 & 31 *Vict.* c. 84, *ss.* 18, 31, 34.] By 30 & 31 Vict. c. 84, s. 31, "if information be given to a justice that a child under the age of fourteen years has not been successfully vaccinated, and that notice has been given to the parent of the child to procure its being vaccinated, and has been disregarded, the justice may summon such parent to appear with the child before him, and if the justice shall find, upon examination, that the child has not been vaccinated, nor has had the smallpox, he may, if he see fit, make an order directing the child to be vaccinated within a certain time; and if at the expiration of such time the child shall not have been vaccinated, the person upon whom such order shall have been made shall be proceeded against summarily, and, unless he can shew some reasonable ground for his omission to carry the order into effect, shall be liable to a penalty not exceeding twenty shillings": —*Held*, that a parent, having been fined under this section for disobeying an order to have his child vaccinated, may be proceeded against from time to time as long as the child remains unvaccinated. —By s. 34, in any prosecution for neglect to procure the vaccination of a child, . . . if the defendant produce the certificate in the form B., it shall be a sufficient defence, except when the time specified therein for the postponement of the vaccination shall have expired before the time when the information shall have been laid:—*Held*, that the certificate was no answer to proceedings under s. 31. Allen *v.* Worthy - 163

VALUED POLICY—*Marine Insurance—Value where conclusive—Right of Underwriters, paying on Total Loss, to be subrogated for Insured.*] A policy of insurance was effected for 6000*l.* on the ship *H.*, valued at 6000*l.* The *H.* was run down and sunk by another ship, and the underwriters paid the owners the 6000*l.* as for a total loss. Afterwards 5000*l.* was recovered in the Court of Admiralty in respect of the *H.* against the owners of the other ship. The real value of the *H.* was 9000*l.*; and there was no other insurance upon her:—*Held*, that, as between the underwriters and the assured, the value of the *H.* must be taken to be 6000*l.* for all purposes; and that therefore the damages recovered, which were in the nature of salvage, belonged entirely to the underwriters. The North of England, &c., Insurance Association *v.* Armstrong - - 244

VENDOR AND PURCHASER—Delivery order—Estoppel - - - - 660
See Assent to Delivery Order.

—— Foreign market—Purchase by agent
See Order to Purchase. [Ex. Ch. 516

VENDOR AND PURCHASER—*continued.*
—— Sale of leasehold—Title - - 213
See Title to Leasehold.

VERDICT—Issue going to merits—General costs
See General Costs. [53

VERDICT UNDER 40s.—Slander—Costs - 239
See Slander.

VISITATION—Archdeacon—Liability of churchwardens to pay fee to registrar - 573
See Churchwardens.

WARRANTY—Due care in constructing carriage or building - 184, Ex. Ch. 501
See Negligence in Constructing Building.

WAY, DEDICATION OF—*Limited Dedication—Right of Owner of Soil to Plough up Footpath.*] There may, in law, be a dedication to the public of a right of way, such as a footpath across a field, subject to the right of the owner of the soil to plough it up in due course of husbandry, and destroy all trace of it for the time. As far as living memory went, the occupier for the time being of a field over which a footpath crossed had been in the habit, in due course of farming, of ploughing up the whole field, and so destroying the footpath. There was no evidence of the existence of the footpath before living memory:—*Held*, that the inference to be drawn was, that the owner had originally dedicated the right of way to the public, subject to this right of periodically ploughing it up. Mercer *v.* Woodgate - - 26

—— Sea-wall - - - - - 397
See Sea-Wall.

WAYWARDEN—Election - - - 457
See Election of Waywarden.

WEIGHT—Sale of bread - - - 453
See Bread.

WIFE: *See* Husband and Wife.

WILL—Testamentary capacity - - 549
See Testamentary Capacity.

WILLS ACT: *See* Statutes—1 Vict, c. 26.

WINE AND BEERHOUSE ACT, 1869 (32 & 33 *Vict. c.* 27), *ss.* 7, 8—*Notice of Application for Certificate of Justices—Prior Application—Res judicata.*] By 9 Geo. 4, c. 61, s. 1, justices in every county, &c., are to hold a general annual licensing meeting between the 20th of August and the 14th of September; and, by s. 3, they are required to continue such meeting by adjournment to such days (during August and September) and places as they may deem most convenient for enabling persons to apply for a licence. By 32 & 33 Vict. c. 27, s. 4, no licence is to be granted without a certificate of justices. By s. 5 certificates are to be granted by the justices at the general annual licensing meeting held in pursuance of 9 Geo. 4, c. 61, or at some adjournment of such meeting. By s. 7 every person intending to apply for a certificate shall, twenty-one days before he applies, give notice in writing of his intention, as in the section prescribed:—*Held*, that the notice might be given twenty-one days before, and the application made at, an adjourned meeting. At a general annual licensing meeting B. applied for a certificate for a certain house. It was proved that he had been convicted of misconduct in another house. The justices refused the certificate. At an adjourned meeting D. applied for a certificate for the first house:—*Held*, that the fact of the certificate having been refused to B. was no bar under s. 8 to the application by D. The Queen *v.* The Justices of the West Riding. Drake's Case - - - - - - 33

2. —— (32 & 33 *Vict. c.* 27), *s.* 17—*Previous Conviction—Offence against Tenor and Conditions of Licence—Second Offence.*] By s. 17 of The Wine and Beerhouse Act, 1869, "where any person is convicted of an offence against the tenor or conditions of a licence granted to him under any of the therein recited Acts, if any previous conviction since the passing of this Act be proved against him, the offence of which he is last convicted shall be deemed to be a second or third offence as the case may be. The defendant, who held a licence to sell beer under 11 Geo. 4 & 1 Wm. 4, c. 64 (one of the recited Acts) had been, since the passing of the above Act of 1869, convicted under 11 & 12 Vict. c. 49, s. 1, of keeping her house open on Sunday forenoon, which was also contrary to the tenor of her licence, and she was afterwards convicted of refusing to admit a constable under 4 & 5 Wm. 4, c. 85, s. 7, and adjudged as for a second offence:—*Held*, that the first conviction was for an offence against the tenor of her licence so as to make it a previous conviction within the meaning of s. 17. Ex parte Short - - - - - - - 174

WITNESS — Bribery — Election — Certificate of commissioners - - - 377
See Corrupt Practices Prevention Acts.

WORDS—"Default in payment of any sum recoverable summarily before a justice"
See Debtors Act, 1869. [176

—— Cargo "expected to arrive" - - 429
See Cargo "Expected to Arrive."

—— "Engine or instrument" - - 336
See Taking Game on Sunday.

—— "Factory" - - - - 19
See Factory Act, 1867.

—— "Highway repairable by inhabitants at large" - - - - 218
See Road, Liability to Repair.

—— Land "used only as a railway constructed under the powers of an Act of Parliament for public conveyance" - 157
See Land used as a Railway.

—— "Like proceedings" - - - 87
See Highway Act, 1864. 1.

—— "Manufacturing process" - - 19
See Factory Act, 1867.

—— "Medicine" - - - - 296
See Pharmacy Act, 1868.

—— "Not to permit sale by auction on premises" - - - - 283
See Evidence of Breach of Covenant.

—— "Parish or place" - - - 391
See "Parish or Place."

WORDS—*continued.*
—— "Poison" - - - - - 296
See Pharmacy Act, 1868.
—— "Port or ports of loading" - Ex. Ch. 584
See "Port or Ports of Loading."
—— "Recovered" - - - - - 418
See County Court Jurisdiction.
—— "Superior Court" - - - 418
See County Court Jurisdiction.
WORDS—*continued.*
—— "Township" - - - - - 391
See "Parish or Place."
WORK AND LABOUR—Relevance of evidence to prove order - - - - - 285
See Relevancy of Evidence.
WRIT—Appearance in person - - 76
See Appearance to Writ in Person.

*** For Regulæ Generales, 1869 & 1870, see p. 669.

END OF VOL. V.

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